No. 05-__05-354

IN THE

Supreme Court of the United States

City of Columbus, et al.

Petitioners,

v.

Hazel Golden.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan E. Ashbrook
COLUMBUS CITY ATTORNEY'S
OFFICE
90 W. Broad Street
Suite 200 City Hall
Columbus, OH 43215

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

Municipalities regularly confront the question of how to ensure that they receive payment for utility bills on rental properties. Renters frequently leave without paying outstanding balances. Many municipal utilities address this concern by making the landlord, rather than the tenant, responsible for payment. They provide service to rental properties only through contracts with landlords and terminate service to the property for nonpayment. As a consequence, new renters will be unable to secure utility service if their landlords fail to pay an outstanding arrearage. The courts of appeals are avowedly divided over the constitutionality of these common schemes.

The Question Presented is:

Whether the government's termination of water service to a rental property based on the landlord's failure to pay the unit's outstanding utility bill violates the equal protection rights of a current tenant who did not incur the arrearage.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Cheryl Roberto, Director of Public Utilities for the City of Columbus, was a defendant below and is a petitioner here. Nikki Mara was a plaintiff in the district court, but did not participate in the proceedings on appeal and accordingly is not a respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Columbus et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-28a) is reported at 404 F.3d 950. The opinion of the district court (Pet. App. 29a-50a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2005. Justice Stevens extended the time to file this petition to and including September 15, 2005. App. No. 05A29. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions are reproduced in the appendix to this petition (at 51a - 58a).

STATEMENT

1. The City of Columbus (City), through its Department of Public Utilities, supplies water to residents of central Ohio. The City finances this service by charging customers an amount sufficient to cover the operating expenses for the Division of Water. Because of the difficulty in collecting unpaid water bills from often transient tenants, city ordinances provide that the "owners of real estate premises installing or maintaining water service shall be liable for all water charges incurred for service at said premises." City of Columbus Code 1105.045(C) (reproduced at Pet. App. 53a). Accordingly, all water bills are sent to the landlord, although

a copy may also be sent to the tenant if the landlord and tenant agree to such direct billing and there is no current arrearage on the property at the time of the direct billing application. *Id.* § 1105.045(D). The direct billing does not, however, relieve the landlord of responsibility for the water bill. *Id.* § 1105.045(E). Instead, all water charges are "made a lien upon the corresponding * * * premises served by a connection to the water system of the city." *Id.* § 1105.045(A).

If an arrearage develops, the City will provide notice to the landlord and to the service address. City of Columbus Code 1101.03(b). If the bill is not paid within twenty-one days of the notice, the City may terminate water service to the premises. *Id.* §§ 1101.03(a), 1105.12(D). "Water service will not be resumed until all service charges due and payable have been collected or a suitable payment agreement has been received from the customer of record or the owner of the real estate." *Id.* § 1105.12(D).

2. Respondent Hazel Golden is a former tenant of a rental house in Columbus. At the time she moved into the house, there was an outstanding balance on the water bill for the premises which neither the prior tenant nor the landlord had paid. Pet. App. 4a. During the first few months of respondent's tenancy, the City sent notices of this delinquency both to the premises and to the landlord on numerous occasions. When the landlord did not pay the bill as required by city ordinances, water service to the house was terminated. *Ibid.* Service was resumed on several occasions at the request of the City's code enforcement department, but turned off again when the landlord continued to fail to pay the outstanding water bill.[1] Respondent eventually vacated the premises in October 2001. *Id.* 5a.

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[1] During this time, respondent submitted an application for direct billing, but received no response. Pet App. 5a. Because there was a pending arrearage, however, respondent did not qualify for a direct billing arrangement under the code. See City of

3. On July 25, 2001, respondent filed suit in the Southern District of Ohio, alleging among other things that petitioners violated her right to equal protection of the laws by terminating water service to her rental unit because of a debt for which she was not responsible.

On June 6, 2002, the district court dismissed respondent's equal protection claims. Pet. App. 39a. The court rejected respondent's assertion that "because water is a necessity of life it is therefore a 'fundamental' need and therefore the City must have a compelling reason for treating landowners and non-landowners differently." *Id.* 36a. Instead, the court applied rational basis review because the City's policy affected only economic interests rather than fundamental constitutional rights. *Ibid.* The district court then held that the City's policy was a rational means of ensuring payment of water bills and of "maintaining a financially stable municipal utility." *Id.* 37a.[2]

4. On appeal, the Sixth Circuit reversed. Although the court of appeals agreed with the district court that rational basis scrutiny applied to respondent's claims, it disagreed with the district court's determination that the City's policy was rational. Instead, the court concluded that the City's

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Columbus Code 1105.045(E). In any event, even if a direct billing arrangement had been approved, this would not have removed the prospect of termination of service to the premises based on the unpaid bills arising under the prior tenancy. See *id.* § 1101.03.

[2] Respondent also alleged that petitioners violated her right to due process of law by terminating her water service without adequate notice and a hearing, that the Division of Water violated its "common law duty to serve" by terminating her water service in an arbitrary and unreasonable manner, and that petitioners' policy of authorizing only property owners to open water service accounts violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, because it results in a disparately high rejection rate for women and minority applicants. Pet. App. 29a. The court rejected these claims and denied class certification. *Id.* 50a.

policy "divides tenants in an irrational manner because it denies water service only to those tenants whose predecessors or landlords failed to pay the water bills." Pet. App. 17a. The court explained that this conclusion was compelled by its prior decision in *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684 (CA6 1976), aff'd on other grounds, 436 U.S. 1 (1978), which in turn adopted the reasoning of the Fifth Circuit's decision in *Davis* v. *Weir*, 497 F.2d 139 (1974). The court in *Davis* held unconstitutional a similar policy, reasoning that "[t]he City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence – water." *Id.* at 145. Because the court in *Davis* construed such policies as an illegitimate attempt to extract payment from the new tenant, it held that scheme was "devoid of logical relation to the collection of unpaid water bills from the defaulting debtor." *Id.* at 144-45.

Petitioners argued to the Sixth Circuit that this conclusion was based on a mistaken premise. The City's termination practice, petitioners explained, is dir ted at securing payment from the landlord, who is legally responsible for the debt, not from the new tenant, who is not. But the Sixth Circuit was not persuaded. "Whether the City's goal is that it be repaid by the person who owes the debt or by the tenant who is directly affected by its collection scheme is immaterial for constitutional purposes." Pet. App. 20a. The court held that while it would be rational for the City to sue a landlord or prior tenant to collect the debt, "'refusing service to an unobligated new tenant is not.'" *Ibid.* (citation omitted).[3]

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[3] The court also noted that subsequent to the events at issue in this litigation, the City amended its ordinances to allow a tenant in respondent's position to avoid termination of water to her unit by paying rent into an escrow account. Pet. App. 20a (citing City of Columbus Dep't of Pub. Utils. Rule and Regulation No. 2002-01).

The Sixth Circuit noted that its decision was consistent with decisions from the Fifth, Seventh, and Ninth Circuits, but in conflict with a decision of the Third Circuit. See Pet. App. 18a-19a (citing *Davis* v. *Weir*, 497 F.2d 139, 144-145 (CA5 1974); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350, 1355 (CA7 1978); *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Ransom* v. *Marrazzo*, 848 F.2d 398, 412-13 (CA3 1988)).[4]

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important opportunity for this Court to resolve a recurring conflict among the federal courts of appeals regarding the authority of local governments to institute effective collection systems for municipal utilities. The Fifth, Sixth, Seventh, and Ninth Circuits have each held that the Equal Protection Clause prohibits a municipality from making landlords responsible for the payment of utility bills for their rental properties and terminating service to the property if the bill is not paid and the tenant living in the unit at the time of termination is not responsible for the arrearage. As the court of appeals acknowledged below, that conclusion conflicts with the law of the Third Circuit. It also conflicts with the law applied in the state courts in Ohio, creating an untenable conflict between the state and federal courts in that state. In addition, the decision below departs substantially

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The court declined to decide whether, so amended, the City's ordinances "pass constitutional muster," *ibid.*, given that respondent was seeking damages for a termination under the prior regime. The court also concluded that the amendment did not moot respondent's suit for damages and a declaratory judgment, noting that the City had not claimed that the new rule was a permanent, rather than temporary, change. *Id.* 20a n.10.

[4] The court of appeals affirmed the district court's denial of class certification and grant of summary judgment with respect to respondent's due process and ECOA claims. Pet. App. 2a.

from this Court's deferential standard of review for equal protection claims involving economic legislation, invading the prerogatives of local governments and impeding the ability of thousands of local water authorities to efficiently manage their water systems. It is not merely "rational," but entirely sensible, for the government to hold landlords responsible for utility bills on their rental properties and to terminate service for nonpayment – such a policy creates a powerful incentive for landlords to pay for the water already delivered to their property in order to be able to rent the property to a new tenant. Review by this Court is warranted.

I. The Courts Are Deeply Divided Over Whether The Equal Protection Clause Permits A City To Terminate Utility Service To A Rental Property When The Current Tenant Is Not Responsible For The Debt.

This Court's intervention is required to resolve an entrenched division of authority among the federal courts of appeals, and between the Sixth Circuit and the Ohio state courts, over whether a municipal utility may terminate service to a property based on unpaid bills for the premises when the property is currently occupied by a tenant who did not incur the arrearage.

1. Four circuits have held that the Equal Protection Clause prohibits municipal utilities from refusing to provide water service to a rental property based on the landlord's failure to ensure payment of a bill accrued by a prior tenant. The first court to do so was the Fifth Circuit in *Davis* v. *Weir*, 497 F.2d 139 (1974). The plaintiff in that case rented an apartment in Atlanta for a monthly fee that included all water charges. The landlord, however, refused to pay a disputed water bill for the premises. Service to the tenant's unit was eventually terminated for nonpayment. The tenant asked to have a new account opened in his name and service restored. However, the city water department refused to do so until the existing arrearage was paid.

The Fifth Circuit held that "the Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass XIV Amendment muster under traditional 'rational basis' analysis." *Id.* at 144. The city's policy, the court held, divided applicants for water services "into two categories: applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges." *Ibid.* While the court recognized that "[n]o one could doubt that the Department's methods are calculated to expedite the liquidation of unpaid bills," it concluded that the city's collection scheme "divorces itself entirely from the reality of legal accountability for the debt involved." *Ibid.* The court then held that the scheme was "devoid of logical relation to the collection of unpaid water bills from the defaulting debtor," *id.* at 144-45, and therefore failed rational basis scrutiny.

The Fifth Circuit's rationale in *Davis* has been adopted by the Sixth, Seventh, and Ninth Circuits, each of which has held unconstitutional a city water department's refusal to provide service to a rental unit based on the landlord's failure to pay a water bill accrued by a prior tenant. See Pet. App. 18a; *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350, 1355 (CA7 1978); see also *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976), aff'd on other grounds, 436 U.S. 1 (1978). In each of these cases, a municipal water authority required landlords to bear ultimate responsibility for water bills accrued at their rental properties. In each case, city ordinances permitted the water authority to terminate service to the premises if the water bill for the unit went unpaid. And in each case, the court of appeals held that this system of collection failed rational basis scrutiny because of its effect on innocent tenants. See Pet. App. 18a; *O'Neal*, 66 F.3d at 1068; *Sterling*, 579 F.2d at 1355; *Craft*, 534 F.2d at 690.

2. As the Sixth Circuit acknowledged in this case (Pet. App. 18a-19a), however, its conclusion conflicts with the Third Circuit's decision in *Ransom* v. *Marrazzo*, 848 F.2d 398 (1988). In that case, the court rejected the claim that a "city's practice of denying service to applicants at properties encumbered by past due charges violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 412. The court acknowledged the contrary holdings of the Fifth and Sixth Circuits, but was "not persuaded by the equal protection analysis" in those cases. *Ibid.* The court rejected the Fifth Circuit's conclusion that a city's only legitimate interest is in the collection of unpaid water bills "'from the defaulting debtor.'" *Id.* at 413. Instead, the Third Circuit concluded that the "city has a valid interest in collecting the unpaid [bill] from any source." *Ibid.* "Although there may be no logical relation between a classification scheme based on encumbrances on property that ignores personal liability and the narrow goal of collecting debts *from debtors*, there certainly is a logical relation between such a scheme and the more general goal of collecting debts, period." *Ibid.* (emphasis in original) (citations omitted).[5]

3. The Sixth Circuit's decision in this case also conflicts with the law followed in the state courts of Ohio. In *Morrical* v. *Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984), a municipal water authority terminated service to a rental property after a prior tenant moved out, leaving an

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[5] The Eleventh Circuit's decision in *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536 (1986), is also in substantial tension with the Sixth Circuit's decision below. The plaintiffs in *DiMassimo* challenged the city's refusal to open a water account in a tenant's name unless the landlord agreed to the arrangement and guaranteed payment of the bill. *Id.* at 1537. The Eleventh Circuit rejected the plaintiff's claim that "providing water only to those tenants who obtain their landlord's permission to receive utility services" lacked a sufficient relationship to the city's "objective of maintaining a financially sound utility system." *Id.* at 1541.

arrearage the landlord refused to pay. *Id.* at 379. The refusal to resume service to the new tenant was upheld against an equal protection challenge. After reviewing prior precedent from the Supreme Court of Ohio and other states, the court held that "a municipal ordinance which imposes liability on a property owner for water services provided to a tenant on the premises does not violate the Equal Protection clauses of either the state or federal Constitutions." *Id.* at 381. The court therefore refused to order the municipality in that case to resume service to the newly occupied rental unit. *Ibid.*

Accordingly, a system like petitioners' will be held unconstitutional in a federal court in Ohio, but upheld if the suit is brought in a state court. This division between the federal and state courts in Ohio is untenable and grounds for review by this Court. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 2410, 2414 (2005); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

4. The division of authority is considered, mature, and entrenched. In reaching its decision in this case, the Sixth Circuit acknowledged the circuit split and specifically rejected the reasoning of the Third Circuit. Pet. App. 18-19a. The Ninth Circuit likewise reviewed the divided authority and chose to side with the Fifth and Sixth Circuits over the Third. *O'Neal*, 66 F.3d at 1067-68. The Third Circuit, in turn, specifically considered the views of the Fifth and Sixth Circuits, but found them unpersuasive. *Ransom*, 848 F.2d at 412. Moreover, the division has persisted for more than fifteen years, during which time the split has widened, rather than narrowed. Accordingly, it is unlikely that the conflict among the circuits will be resolved without intervention by this Court.

This case also presents an ideal vehicle for resolving the division among the courts of appeals. The constitutional question is directly presented by the facts of the case, was fully litigated below, and formed the sole basis of the court of appeals' decision in respondent's favor.

II. The Question Presented Is Recurring And Important, Affecting The Financial Stability Of Tens Of Thousands Of Municipal Utilities.

Review is also warranted because the legal question over which the lower courts are divided has important practical and legal consequences for municipal utilities and local governments. Approximately three-quarters of Americans obtain their drinking water from one of the more than 25,000 municipal water systems throughout the nation. See Congressional Budget Office, *Financing Municipal Water Supply Systems* 1-2 (1987). The ability to effectively collect payment for water services is vital to the financial viability of municipal water authorities, many of which receive no outside financial assistance from the government and must, therefore, cover all operating expenses through the revenue collected from their customers. Many systems operate under precarious finances, struggling to meet an expanding demand for service with an aging infrastructure while at the same time customers fail to pay millions of dollars in utility bills.[6] A survey by the Environmental Protection Agency, for example, reported that twenty percent of large public water authorities were operating at a deficit in 2000. See Environmental

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[6] See, *e.g.*, Anthony DePalma, *Water Isn't Free, New York Is Told*, N.Y. TIMES, July 3, 2005, § 1, at 1 (water authority for New York City estimates $16 billion in capital improvements needed in next decade, while $625 million in bills go unpaid); Sylvia Cooper & S.B. Crawford, *Unpaid Bills Cost City Millions: Bad Debts to Water System Hit $2.6 Million Since 1996*, AUGUSTA (GA.) CHRONICLE, Sept. 26, 1999, at A1 (Augusta wrote off $1.24 million in unpaid debt and had another $1.37 million on the books in 1999); D'Vera Cohn, *For Some D.C. Water Authority Workers, Bottled Is the Way to Go*, WASH. POST, Sept. 5, 1997, at B1 (in 1997, the D.C. Water and Sewer Authority was owed $30 million in unpaid water bills); Tom Barnes, *Water Rate Increase Plan May Be Dropped*, PITTSBURGH POST-GAZETTE, Nov. 8, 1996, at A-1 (Pittsburg still owed $9 million in unpaid water bills after a crackdown effort that netted $10 million in past due fees).

Protection Agency, Community Water System Survey 2000 Vol. 1, at 37. Effective collection of water debts, therefore, is essential to ensuring the financial health of these public utilities and maintaining the affordability of this important service for American consumers.

Holding property owners responsible for the cost of the water provided to their properties is the norm, whether the property is used by the owner as a primary residence, business, or rental property. While some utilities make an exception for rental units contracting directly with tenants, a great many municipalities do not, for good reason. Attempting to collect on delinquent accounts from renters is difficult, expensive and, frequently, futile. Renters, as a group, are often transient and frequently have no assets from which to collect a judgment even if one were secured. Accordingly, the cost of collecting an unpaid water bill from a tenant frequently exceeds the amount recovered. As a result, a great many municipalities in Ohio and throughout the nation refuse to provide special treatment for rental properties and, instead, contract only with landlords or require landlords to maintain ultimate responsibility for payment of tenants' water bills. For example, in Ohio alone, such policies are employed by the cities of Cincinnati, Toledo, Cleveland, Akron, and a number of smaller municipalities and counties.[7] Terminating service to landlords who fail to pay the water bills for which they are responsible is a traditional and

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[7] See Cincinnati City Ordinance 401-71, 401-95; Toledo Mun. Code 933.07; Cleveland Mun. Code 535.16; Akron Water Works Rule 305, 308 (available at *http://ci.arkon.oh.us/146/office/ rules-regs.pdf* (visited Sept. 14, 2005)); Green County Office of Sanitary Engineering, Regulations and Specifications, Part A, § 307 (available at *http://www.co.greene.oh.us/saneng/REGS/REGSAPT3 (SEC3).pdf* (visited Sept. 14, 2005)); Loraine City Ordinance 911.215; New Breman City Ordinance 50.06; Streetsboro City Ordinance 925.03.

widespread method of effectively and inexpensively securing compliance with the terms of the landlord's obligations.[8]

The decisions of the Fifth, Sixth, Seventh, and Ninth Circuits preclude municipal utilities within their jurisdiction from employing this long-standing and reasonable method of collecting outstanding water bills from landlords.[9] The

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[8] See Cincinnati City Ordinance 401-93-A; Toledo Mun. Code Part IX, Title III, App. C, §§ 101.021, 101.03, 101.07; Cleveland Mun. Code 535.15-535.16; Akron Water Works Rule 112, 306, 308; Green County Office of Sanitary Engineering, Regulations and Specifications, Part A, § 307; Loraine City Ordinance 911.220; New Breman City Ordinance 50.06; Streetsboro City Ordinance 925.03(j); see also Missouri Landlord Accountability Ordinance 1 (available at *http://www.mocities.com/default.asp?pageID=11521&sectionID=59* (visited Sept. 14, 2005)) (model ordinance published by Missouri Municipal League).

See generally New York City Water Board, Statement of Basis and Purpose, Regulation Governing the Discontinuance of Water Supply and/or Sewer Service Because of Nonpayment 1 (1999) (available at *http://www.nyc.gov/html/dep/pdf/shutoff.pdf*) ("Most water utilities have shut-off regulations as an integral part of their enforcement policy. Water utilities with high collection rates tend to use shut-offs more frequently than utilities with lower rates.").

See further Sylvia Cooper & S.B. Crawford, *supra* (comparing the $2.6 million in unpaid water bills in Augusta to Columbus, Georgia, where the low amount of unpaid bills was due to a strict cut-off policy for accounts in arrears); Frederic Pierce, *Syracuse Threatens Water Shutoff*, THE POST-STANDARD, July 31, 2002, at A1 (describing the decision to shut off water service for delinquents in Syracuse, New York); Michael C. McDermott, Crackdown Vowed on Overdue Bills, THE PATRIOT LEDGER, July 27, 2001, at 13 (stating that Braintree, Massachusetts, considered terminating service in order to collect on unpaid bills).

[9] Thus, for example, the Ninth Circuit's decision in *Davis* has partially invalidated a Washington State statute that permits municipalities to terminate utility service to a premises based on non-payment for services provided to the property, without regard

unresolved division also creates substantial uncertainty for water systems in other circuits seeking ways to improve their collection rates and practices. Cf., *e.g.*, Anthony DePalma, *Water Isn't Free, New York Is Told*, N.Y. TIMES, July 3, 2005, § 1, at 1 (stating that City of New York considering authorizing termination of services as means of collecting a portion of more than $625 million in unpaid water bills and penalties).

III. Review Is Warranted To Correct The Sixth Circuit's Substantial Departure From The Deferential Standard Of Review Required For Ordinary Economic Legislation.

The Sixth Circuit's decision is wrong, the result of a substantial departure from the deferential standard of review this Court's equal protection precedents apply to ordinary economic legislation.

The court of appeals recognized that respondent's equal protection claim is subject to rational basis scrutiny. Pet. App. 16a. Neither this Court, nor any court of appeals, has held that provision of municipal water services is a "fundamental right," triggering strict equal protection scrutiny. While access to water services is no doubt important, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental" for equal protection purposes. *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 30 (1973). "Rather, the answer lies in assessing whether [the right is] explicitly or implicitly guaranteed by the Constitution." *Id.* at

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to whether the current resident is responsible for the arrearage. See R.C.W. 35.21.290-.300; Municipal Research & Svc. Ctr. of Washington, *Collection Practices for Delinquent Utility Accounts* (available at *http://www.mrsc.org/Subjects/PubWorks/utilbillcollect.aspx#landlord* (visited Sept. 14, 2005)) (advising Washington municipalities that "[t]his statutory authority was modified by O'Neal v. Seattle")

33-34. The right to water service is "not among the rights afforded explicit protection under our Federal Constitution." *Id.* at 35. Moreover, there is no basis for construing the Constitution to implicitly recognize water service as a fundamental right. Cf. *ibid.* (finding no basis for saying that the right to education is implicitly protected).

Accordingly, to pass muster under the Equal Protection Clause, petitioner's water service policies need only be "rationally related to a legitimate state interest." *Friedman* v. *Rogers*, 440 U.S. 1, 17 (1979) (citation omitted). This standard is highly deferential, affording the challenged classification "a strong presumption of validity." *Heller* v. *Doe*, 509 U.S. 312, 319 (1993). Indeed, under rational basis scrutiny "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* at 320 (citation omitted).

The purported constitutional infirmity identified by the court of appeals arises from the interaction of two aspects of the City's policy: (1) the City's decision to contract only with landlords for the provision of water services to rental properties;[10] and (2) the resulting consequence that terminating service to a delinquent landlord may cut off water to a tenant who did not incur the liability. See Pet. App. 17a. Both aspects of the policy are rationally related to a legitimate governmental purpose.[11]

As all courts considering this issue have recognized, a municipality has an important interest in ensuring the fiscal

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[10] While the City permits dual billing of landlord and tenant (if the landlord consents and the account is current), the contract remains with the landlord. See Pet. App. 3a; City of Columbus Code 1105.045.

[11] Indeed, the policy would withstand substantially greater constitutional scrutiny. See, *e.g.*, *Ransom* v. *Marrazzo*, 848 F.2d 398, 413 (CA3 1988) (finding Philadelphia's water shutoff policy bears "substantial relation" to "important governmental objectives").

soundness of its utility system by collecting unpaid utility bills from the individuals who are legally responsible for these debts. Because of the difficulty in collecting unpaid bills from tenants, the City has chosen to contract for water services only with landlords and to subject the rental property to a lien in the event that the landlord fails to pay the water bill for the property. City of Columbus Code 1105.045(A). That decision is entirely rational. As the Eleventh Circuit explained in *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536 (1986), a city may rationally conclude that unpaid debts can be collected more readily from landlords than from tenants, since the landlord owns property in the jurisdiction that can be subject to a lien, while tenants are often transient and frequently lack substantial assets. At the same time, landlords are better positioned than the water authority to collect the cost of water service from the ultimate user, since landlords are already collecting rents from the tenants. A policy like the City's also has the salutary effect of providing the landlord an incentive to minimize wasteful water use in the building by, for example, maintaining the plumbing in the facility.

Accordingly, this Court has long recognized the legitimacy of holding landlords liable for tenants' unpaid water bills. More than eighty years ago, in *Dunbar* v. *City of New York*, 251 U.S. 516 (1920), this Court rejected a constitutional challenge to a New York City ordinance that converted tenants' unpaid water charges into a lien upon the property, payable by the landlord. The Court found this requirement nothing more than "an ordinary and legal exertion of government to provide means for its compulsory compensation" for the water services it provided. *Id.* at 518. The Court recognized that the landlord might not be the direct consumer of the water, but held that it was "of no consequence * * * at whose request the [water] meters were installed in the property." *Ibid.* For while the tenants obviously benefited from the water service, so did the landlord – the property "would be unfit for human habitation

if it could not get water," and therefore of no value to the owner as a landlord. *Ibid.*

Likewise, the City's policy of requiring landlords to bear responsibility for water contracts recognizes that owners of rental property receive substantial benefit from the city's provision of water to the units, even if the tenants are the direct recipients. It is both fair and entirely rational to require the landlord to ensure payment for a government service that makes its business possible.

At the same time, there is nothing irrational in terminating service to a rental property when the landlord fails to pay the bill, even though this may impose a burden on the landlord's tenants. Terminating service to a landlord is a particularly effective means of ensuring payment of a past-due account since, as this Court recognized in *Dunbar*, without water, the landlord's units are uninhabitable and cannot be a source of revenue for the debtor. [12] At the same time, refusing to continue to provide water to a landlord who has demonstrated his unwillingness to pay the water bill is a prudent measure to prevent further financial losses.

The court of appeals nonetheless concluded that the City's policy was irrational because "the person directly penalized by the scheme is not the debtor but an innocent third party with whom the debtor contracted." Pet. App.

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[12] In Columbus, landlords who fail to ensure water service to their tenants are in violation of city housing codes, guilty of a third-degree misdemeanor, and subject to fines of up to $500 and imprisonment of up to sixty days. City of Columbus Code 4509.99(A), 4521.01-.02. "Each day that any such person continues to violate any of the provisions of this Housing Code shall constitute a separate and complete offense." *Id.* Failure to provide water service also violates Ohio's landlord-tenant statute. See Ohio Rev. Code 5321.04(A)(6). In most cases, upon proper notice to the landlord, a tenant denied water service may terminate the lease, pay rent into court, and/or seek a court order against the landlord to restore service. See *id.* § 5321.07.

20a.[13] The Fifth Circuit elaborated on this concern in *Davis*, finding that such policies are unconstitutional because a city "has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence–water." *Davis*, 497 F.2d at 145.

This conclusion rests on the flawed premise that the purpose of such termination policies is to extract payment from the current tenant, rather than from the landlord who is legally responsible for the debt. Even if rational basis scrutiny authorized an inquiry into the actual subjective motivation behind the enactment of the City's ordinance, which it does not,[14] respondent has presented no evidence that

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[13] This statement is incorrect as a factual matter. Nothing in the policy "directly" penalizes tenants, innocent or otherwise. Indeed, the ordinances impose no facial classification on tenants at all but rather distinguish between landlords who have paid the water bills for which they are liable and those landlords who have not. The policy may have a *disparate impact* on innocent tenants, but disparate impact "alone is insufficient" to prove a violation of the Equal Protection Clause "even where the Fourteenth Amendment subjects state action to strict scrutiny." *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 372-73 (2001) (citing *Washington* v. *Davis*, 426 U.S. 229, 239 (1976)). See also *Califano* v. *Boles*, 443 U.S. 282, 294-95 (1979) (denial of social security benefit to unwed mothers did not classify children based on illegitimacy, even though illegitimate children suffered collateral consequences from denial of benefits to their mothers). As discussed *infra*, such collateral effects are a common and unavoidable consequence of any government regulation of landlords and of government action generally.

[14] Under rational basis review, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision" under challenge. *U.S. Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960)). See also *Heller*, 509 U.S. at 320-21 (plaintiff bears burden

the rules were enacted for the illegitimate purpose of extracting money from innocent tenants. Nothing in the City's policy makes new tenants legally responsible for the prior debt. The water authority is not, for example, authorized to pursue a collection action against the new tenant. To the contrary, the policy is plainly adapted to securing payment from the *landlord* who *is* legally responsible for ensuring payment. While an innocent tenant may, on occasion, offer to pay the existing arrearage, the City could rationally conclude that it is much more likely that current tenants would respond by pressuring their landlords to pay the arrearages (by, for example, refusing to move in, threatening to move out, calling code enforcement, or withholding rent, see note twelve, *supra*.).

Viewed as a means of collecting debts from defaulting landlords, the City's termination practices easily meet the rational basis standard. While respondent may claim that this effective system is *unfair* to the innocent tenant, that does not render it irrational or unconstitutional. Indeed, as this Court has emphasized, economic legislation will ordinarily be sustained "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). In any case, the perceived unfairness of the government action in this case is no different than that occasioned by innumerable government decisions that have collateral consequences for innocent parties. Tenants, for example, may suffer when a government forecloses on a tax lien, condemns a building for code violations, or exercises its powers of eminent domain. Every such act represents a balancing of interests, one the Constitution assigns to the people's elected representatives. In this case, the City was faced with various policy alternatives for responding to

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of disproving every conceivable rational basis for the regulation, "whether or not the basis has a foundation in the record") (citation omitted).

unpaid water bills, all of which impose costs on innocent third parties. For example, if the City simply ignored unpaid water bills by prior tenants – or undertook expensive and frequently unsuccessful collection procedures against prior tenants or landlords – that added cost would be passed on to other innocent tenants and water consumers. See DePalma, *supra* (noting that New York City does not terminate service to non-paying customers and has more than $625 million in unpaid bills outstanding, the cost of which is passed on to consumers).[15] As permitted by the Constitution, the City made a rational decision to pursue the most effective collection scheme available and to mitigate the harsh effects on tenants through a variety of other measures, see note 12, *supra*. The Equal Protection Clause does not authorize the federal courts to superintend these policy decisions. The Sixth Circuit's substantial departure from ordinary principles of deferential review of state economic regulation should be corrected.

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[15] See also Harold McNeil, *City Could See Water Rate Rise by 12%; Official Ties Budget Gap to Delinquent Accounts*, BUFFALO NEWS, May 27, 1994 (describing possible water rate increases to make up for money owed in unpaid water bills); Michael C. McDermott, *Crackdown Vowed on Overdue Bills*, THE PATRIOT LEDGER, July 27, 2001, at 13 (quoting a water and sewer commissioner in Braintree, Massachusetts as saying that "[w]e have so many accounts in arrears that we're really using the good payers' money to run the system").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan E. Ashbrook
COLUMBUS CITY ATTORNEY'S
OFFICE
90 W. Broad Street
Suite 200 City Hall
Columbus, OH 43215

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

September 15, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-4252

HAZEL GOLDEN,
PLAINTIFF-APPELLANT,

v.

CITY OF COLUMBUS; CHERYL ROBERTO, DIRECTOR OF PUBLIC UTILITIES FOR THE CITY OF COLUMBUS,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Southern District of Ohio

Argued October 27, 2004
Columbus, Ohio

Filed April 18, 2005

Before: KEITH, CLAY, and BRIGHT,* Circuit Judges.

CLAY, Circuit Judge:

Plaintiff Hazel Golden appeals the judgment below, in which the district court: (1) granted summary judgment to Defendants the City of Columbus, Ohio, and the City's Director of Public Utilities, Cheryl Roberto[1] (collectively the

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* The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] At the time Golden filed this action, the Director of Public Utilities was John Doutt. Golden sued Doutt in his official and

"City") on Golden's claims that the City's denial of water service to tenants whose predecessors left delinquent water accounts at the premises violates the *Due Process Clause of the Fourteenth Amendment* and the Equal Credit Opportunity Act, *15 U.S.C. § § 1691 et seq.* (the "ECOA"); (2) dismissed Golden's claim that the same constitutes a violation of the *Equal Protection Clause of the Fourteenth Amendment*; and (3) dismissed Golden's motion for class certification. For the following reasons, we REVERSE the district court as to Golden's equal protection claim and AFFIRM as to her due process, ECOA, and class certification claims.

BACKGROUND

Prior to 1991, the City of Columbus, Ohio, permitted both tenants and landlords to contract for water service. Although the landlord would be ultimately liable for unpaid water bills, a tenant could establish a water account in her own name by directly contracting with the City. In 1990, officials at the City's Department of Public Utilities became concerned that permitting tenants to directly contract for water service had the effect of impeding the collection of unpaid water bills. The City code at the time did not require either the City or the contracting tenant to notify the landlord when an account was created, or when an account became delinquent. Landlords complained when they were left to settle accounts they never knew were delinquent after the nonpaying tenants had vacated. These complaints caused further delays in payment. City utilities officials concluded that the City could better insure efficient payment of water bills if it alerted landlords to delinquencies as they occurred.

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personal capacities. The district court dismissed the claims against Doutt in his personal capacity, a decision Golden does not appeal. After Doutt retired, the district court substituted his replacement, Cheryl Roberto, as a defendant pursuant to *Rule 25(d)(1) of the Federal Rules of Civil Procedure*.

Utilities officials also lamented the fact that the City code did not authorize the City to deny service at premises encumbered by delinquent accounts. If a tenant vacated an apartment, leaving a delinquent account, the code nevertheless permitted a new tenant to move in and establish a new water account, even if the landlord had not yet satisfied the delinquency. Officials concluded that this frustrated bill collection by depriving the City of its most effective bill collection tool. With these problems in mind, the Columbus City Council amended the code in 1991. As amended, the pertinent sections now read:

> The [City] will directly bill a tenant for water and sewer service if the property owner, or authorized agent of the property owner, along with the tenant, sign a written agreement authorizing direct billing of the tenant. Once a written agreement is signed, the [City] will simultaneously mail, to both the owner and the tenant, copies of any bills and notices concerning delinquent water and sewer charges . . . .
>
> Direct billing of a tenant shall be in no way construed as to relieve the owner of the real estate premises of liability for water and sewer service charges. No direct billing of a tenant will be allowed where all delinquent water and sewer charges are not paid in full up until the date the direct billing agreement is accepted by the City, or where water or sewer service has been terminated for real estate premises.

Columbus City Code §§ 1105.045(D), (E) (the "policy" or "City's policy").

Plaintiff Hazel Golden moved into a single-family residence at 2209 Hamilton Avenue in Columbus in either

October or December of 2000.[2] The lease between Golden and her landlord, David Matthews, states that the tenant is responsible for the payment of all utilities. However, according to Golden, her rent included water service while she was to pay separately for gas and electricity. At the time Golden began renting from Matthews, he was party to a direct billing agreement with the prior tenant, Sarah Dean, which Dean and Matthews had entered into pursuant to the City's policy.

Starting in late December 2000, the City began sending bills and notices to 2209 Hamilton Avenue addressed to "Sarah E Dean." On December 28, 2000, the City sent a Notice of Delinquency for service provided to Sarah Dean between August 10, 1999 and November 7, 2000. This was followed on February 12, 2001, by a Water Turn-Off Notice; on February 16, 2001, by a bill; on February 22, 2001, by another bill; and on March 8, 2001, by termination of water service to the residence. Service recommenced on March 9, 2001, at the request of the City's Code Enforcement department. Golden alleges that she contacted Code Enforcement after first contacting the City, which explained to her that under the policy, water service would not be restored until the account was paid. This pattern repeated itself during March and early April, with the City again terminating water service on April 9, 2001, and recommencing it the next day at the request of Code

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[2] The record is unclear as to precisely when Golden moved in. In her deposition, Golden said that she moved in "approximately October of 2000." (J.A. at 662.) Yet the lease between Golden and her landlord is dated December 17, 2001. *Id.* at 687. This date cannot be correct since Golden's claims all relate to terminations of water service at the 2209 Hamilton Avenue residence during early 2001. Adding to the confusion, the City cites October 2000 as the date Golden moved in, Brief of Appellee at 4, while Golden relies on December 17, 2000. Brief of Appellant at 4. Inexplicably, the district court concluded that Golden began renting on January 17, 2001. (J.A. at 62).

Enforcement. The City terminated service for a third time on April 23, 2001. Golden maintains that the termination permanently deprived her of water service while the City maintains that it recommenced service on May 9, 2001 without interruption until October 2001 when Golden moved out.

Each of the mailings sent to Golden's residence during the period December 2000 through May 2001 arrived in an enveloped marked "THIS IS YOUR WATER BILL." *See* J.A. at 157, 161. Each notice of delinquency and turn-off notice explains that customers have a right to request a hearing to contest the termination of service but this information is printed on the notice itself, not on the envelopes. The City's Water Customer Service Coordinator, Susan Young, stated in an affidavit that on February 2, 2001, the City sent a bill or a notice addressed to "Water Customer." J.A. at 158. The City does not dispute that all other bills and notices were addressed to "Sarah E Dean."

Matthews and Golden signed a direct billing agreement on March 16, 2001. Golden maintains that she sent the agreement to the City but received no response. J.A. at 737-38 (Golden Depo.). In any event, Matthews apparently did not pay the balance Dean owed - which would have been necessary to make Golden eligible for direct billing under the policy - and the record reflects that bills and notices sent after March 16, 2001 were still addressed to Dean. *See* J.A. at 158-75. Finally, Golden admits that the City left a notice of shut-off on her door contemporaneous with terminating service but alleges that the notice did not inform her of a right to contest the termination of service.

PROCEDURAL HISTORY

On July 25, 2001, Golden and an earlier plaintiff, Nikki Mara, filed a class-action complaint in district court. The complaint, brought under *42 U.S.C. § 1983*, alleged that the City's practice of terminating tenants' water service without notice and the possibility of a hearing amounted to a

denial of tenants' *Fourteenth Amendment* right to procedural due process. The complaint further alleged that the City's policy, which denies water service to premises encumbered by delinquent accounts, violated tenants' rights under the *Equal Protection Clause of the Fourteenth Amendment* and under the Equal Credit Opportunity Act ("ECOA"), *15 U.S.C. § 1691 et seq.* The complaint also alleged that the City's termination of plaintiffs' water service constituted a breach of the City's common law duty to serve; Golden does not appeal the district court's dismissal of this claim. The relief sought in plaintiffs' complaint included a declaratory judgment and damages. The original plaintiffs filed a motion for class certification, the denial of which Golden appeals. Additionally, Golden appeals the grant of summary judgment to the City on her procedural due process and ECOA claims and the dismissal of her equal protection claim.

DISCUSSION

I. Due Process

A. Standard of Review

This Court reviews a district court's decision to grant summary judgment *de novo. E.g., Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 (6th Cir. 2001).* Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c).* The district court, and this Court in its review of the district court, must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* Accordingly, we view the facts in the light most favorable to Golden.

B. Merits of the Due Process Claim

The text of the *Fourteenth Amendment's Due Process Clause* makes clear that the state need not afford due process every time it takes an action that impacts negatively on citizens' lives. The amendment makes a narrower guarantee: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *U.S. CONST. amend. XIV.* Golden contends that the City denied her due process because her expectation of continued water service is "property" within the meaning of the *Due Process Clause*; alternatively, she asserts that water is a "basic necessity of life" and all necessities of life are "property." Brief of Appellant at 13-16. The district court rejected both theories.[3] The court found that Golden did not enjoy a contractual relationship with the City to support a claim of entitlement; nor could she point to a statute that created such an entitlement. (J.A. at 78.) Finally, the court dismissed Golden's "basic necessity for life" rationale, concluding that whether water is "a basic necessity for life is irrelevant to the question of whether water service is a property interest under the *Fourteenth Amendment*." *Id.* at 87.

In the absence of a claim that governmental action impinged on the other interests it protects - life and liberty - it is well established that the *Due Process Clause of the Fourteenth Amendment* regulates only those "actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the *Due Process Clause*." *Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); see also Bd. of Regents v. Roth, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).* But while the Constitution does

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[3] In her complaint, Golden did not plead that she had a property interest in water service; in its answer, the City did not raise the issue either. But the district court instructed the parties to prepare supplemental briefs on the question. (J.A. at 17-18.)

unequivocally protect "property," nowhere does it define the term. To resolve this question, as the Supreme Court held in the seminal case of *Board of Regents v. Roth*, the courts are to turn elsewhere: "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth, 408 U.S. at 577.* Thus for Golden to have a constitutionally recognized property interest in the benefit of water service, she "must have more than an abstract need or desire for it[,] . . . more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it." *Id.* The Supreme Court has identified two bases for such non-unilateral legitimate claims of entitlement: state statutes and contracts, express or implied, between the complaining citizen and the state or one of its agencies. *Id. at 577-78; see also Perry v. Sindermann, 408 U.S. 593, 601-602, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)* (recognizing an express or implied contract as sufficient to support a legitimate claim of entitlement); *Goldberg v. Kelly, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)* (recognizing a state welfare code as supporting a legitimate claim of entitlement).

Golden concedes that she is not a customer and therefore does not enjoy a contractual relationship with the City for the provision of water services. Brief of Appellant at 12, 14. Instead she relies on the Supreme Court's decision in *Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)*, for the proposition that all inhabitants of a city, even those who are not customers of the public utility provider, have a legitimate claim of entitlement to provision of utility service. Brief of Appellant at 13. This interpretation of *Craft* is off the mark. In *Craft*, the Court considered utility customers' procedural due process claim against the City of Memphis for terminating the customers' service without affording them an opportunity to contest

charges about which there was a bona fide dispute. *Craft, 436 U.S. at 5.* The Court found in favor of the complaining customers, because "in defining a public utility's privilege to terminate for nonpayment of proper charges, Tennessee decisional law draws a line between utility bills that are the subject of a bona fide dispute and those that are not." *Id. at 9.* A thorough review of Tennessee case law, *see id. at 9-11*, revealed that the state only permitted termination of service because of non-payment of undisputed charges and that "an aggrieved customer may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund." *Id. at 11.* The availability of "such local-law remedies" to utility customers who dispute charges in good faith "is evidence of the State's recognition of a protected interest." *Id.* Thus *Craft* is plainly limited to utility customers; moreover, as *Roth* requires, the decision is completely determined by state law. *See generally id.; see also Myers v. City of Alcoa, 752 F.2d 196, 198 (6th Cir.)* (recognizing that the holding in *Craft* depended entirely on Tennessee law), *cert. denied, 474 U.S. 901, 88 L. Ed. 2d 225, 106 S. Ct. 271 (1985).*

Golden's reliance on a decision of this Court, *Mansfield Apartment Owners Ass'n. v. City of Mansfield, 988 F.2d 1469 (6th Cir. 1993),* is similarly misplaced. In *Mansfield*, this Court cited *Craft* for the point that "it is well settled that the expectation of utility services rises to the level of a 'legitimate claim of entitlement' encompassed in the category of property interests protected by the due process clause." *Id. at 1474* (citing *Craft, 436 U.S. at 10*). But as the district court below observed, the complainants in *Mansfield* were property owners who had accounts with the City of Mansfield's utility department; it was appropriate, therefore, for the *Mansfield* Court to apply *Craft*. Without evidence of a contractual relationship between Golden and the City, or of a statutory entitlement to water service, it is not appropriate to do so here. But Golden presents no such evidence, which, at least as to the existence of a contract, is not surprising. The

City's policy, established by the 1991 amendment to the Code, effectively barred Golden from establishing a contract with the City until Matthews paid the balance left unpaid by Dean. Indeed, it is abundantly clear that Matthews is to blame for Golden's predicament and ought to have been held to account under Ohio's landlord-tenant law.[4] If Golden's representation of the lease terms is true, Matthews reneged on his promise to pay for water out of her rent. Further, it is undisputed that the City Code makes Matthews liable for delinquent accounts at premises he owns. *See* Columbus City Code § 1105.045(E). However, a landlord's failure to uphold his end of a bargain, even coupled with his failure to comply with a city's code provision regarding the payment of water bills, does not constitute a violation of the *Due Process Clause* by the city.

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[4] Golden stated in an affidavit that she called the City when she first moved into the house at 2209 Hamilton Avenue in order to transfer the water account from Sarah Dean's name to her name. J.A. at 736 (Golden Depo.). The City sent her a direct billing agreement and informed her that she and Matthews would need to sign it. *Id.* at 736-37. The record does not reflect when Golden received the agreement from the City, but it is clear that the signed agreement is dated March 16, 2001. *Id.* at 691. Further, Golden maintains that she sent the completed agreement back to the City as instructed but received no response. *Id.* at 738. It is undisputed, however, that Golden received bills and notices from December 28, 2000 through mid-March 2001 addressed to Sarah Dean. Although she did not contact the City when a bill or notice came in the mail, Golden maintains that she would call Matthews whenever she received one; his response would be a promise to come by and pick the bill or notice up, but according to Golden, "it got to the point where he didn't [pick them up]." *Id.* at 739. The parties do not dispute that Matthews never paid the amount owed by Dean, nor apparently the amount charged to the residence while Golden was a tenant there.

As to the second possible foundation for a property interest cognizable under the *Fourteenth Amendment* - state statutory or common law - Golden cites to no Ohio statutes or case law in support of her argument that she has a legitimate claim of entitlement to water service. We observe *infra* that other circuits have held certain provisions common to landlord-tenant statutes to be sufficient for this purpose. This circuit has not yet considered such an argument. We have applied*Craft* in a case involving the due process claims of property owners who were water customers. *See Mansfield, 988 F.2d at 1473-74* (holding that customers' expectation of continued utility service constituted a protected property interest). And, in an unpublished opinion one year before *Mansfield*, we were similarly faithful to *Craft*, rejecting a homeowner's claim that Ohio law guaranteed water services to its residents. *Cadle v. City of Newton Falls, 1992 U.S. App. LEXIS 10267, No. 91-3717, 1992 WL 88904, *4-5 (6th Cir. 1992)* (unpublished opinion). But neither *Mansfield* nor *Cadle* offers guidance on whether a tenant who is precluded from directly contracting for water service and from obtaining water service at all, due to nonpayment by both the prior tenant and the landlord, may state a claim for deprivation of a property interest without due process of law.

In two cases, the Eleventh Circuit has held that tenants may state such a claim under provisions of Florida's landlord-tenant law. *See James v. City of St. Petersburg, 33 F.3d 1304, 1306-1307 (11th Cir. 1994) (en banc)* (finding a protectable property interest based on Florida law to the effect that a landlord could not terminate a tenant's utility service but finding that because neither tenant nor landlord had established a contract with the utility, which either were allowed to do, the interest did not attach); *DiMassimo v. Clearwater, 805 F.2d 1536, 1539-40 (11th Cir. 1986)* (finding a property interest because "it is clear that Florida's Landlord and *Tenant Act* . . . would not sanction the withdrawal of water services from . . . tenants by their landlords because such action would constitute either the

failure to provide necessary facilities for sustaining life or the constructive eviction of tenants contrary to statutory directives for such action"). The Ninth Circuit has issued a similar ruling pursuant to provisions of Oregon's landlord-tenant law. *See Turpen v. City of Corvallis, 26 F.3d 978, 979 (9th Cir.), cert. denied, 513 U.S. 963, 130 L. Ed. 2d 339, 115 S. Ct. 426 (1994).* These circuits have taken the novel approach of recognizing a property interest in a tenant's right - under landlord-tenant law - to bring an action to enjoin her landlord from constructively evicting her by terminating water service or declining to pay for it. *DiMassimo, 805 F.2d at 1539; Turpen, 26 F.3d at 979.* Depriving tenants of this important remedial right by failing to give proper notice before water service terminates, the courts reasoned, is a due process violation. *DiMassimo, 805 F.2d at 1539; Turpen, 26 F.3d at 979.*

We express no opinion as to whether these precedents weigh in Golden's favor because Golden does not rely upon any provisions of Ohio's landlord-tenant law in this appeal, nor did she do so in the district court. Despite the clear command of the Supreme Court's cases regarding what constitutes a cognizable property interest for *Fourteenth Amendment* purposes, Golden rests her case on the bare assertion that because water is "an absolute necessity of life," the City's termination of her service was unconstitutional. As much as we may agree with Golden's premise as a policy matter, the law precludes us from adopting her conclusion. As support for the necessity-of-life rationale, Golden relies on the now-discredited case of *Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976)*, in which the district court flatly stated, without support, that "water service is an entitlement to which the requirements of due process attach." *Id. at 1384. Koger* appears to be the only reported federal case standing for such a proposition. Although Golden invokes *Davis v. Weir, 497 F.2d 139 (5th Cir. 1974)* for the same point, the city in that case conceded that "due process demands pre-termination notice to the actual user [of water]." *Id. at 143.* In *Davis*,

therefore, the Fifth Circuit did not consider whether the mere use of water service, without more, constitutes a legitimate claim of entitlement to continued service for purposes of the *Fourteenth Amendment*. *Id. at 143.* In any event, it is clear that the plaintiff in *Koger* contested the termination of his water service on substantive, rather than procedural, due process grounds. *See Koger, 412 F. Supp. at 1383-84.* Moreover, the Third Circuit rejected *Koger*'s substantive due process analysis in *Ransom v. Marrazzo, 848 F.2d 398 (3d Cir. 1988)*, concluding that a municipality's denial of water service, if it implicates any federal right, implicates only the procedural protections of the *Fourteenth Amendment*, not its substantive guarantees.[5] *See Ransom, 848 F.2d at 411-12.*

In conclusion, we return to the Supreme Court's command in *Roth*: "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth, 408 U.S. at 577.* While there may be relevant "rules or understandings" under Ohio law, *see* discussion *supra*, Golden does not point us to any. Because she bears the burden of doing so, we affirm the district court's grant of summary judgment to the City on this claim.[6]

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[5] The *Ransom* court did not consider the plaintiffs' procedural due process claims because they were moot. *See Ransom, 848 F.2d at 409-11.*

[6] Because Golden has not demonstrated that she was deprived of a property interest within the meaning of the *Fourteenth Amendment*, we need not determine whether the City afforded her due process prior to terminating water service to her residence.

II. Equal Protection

A. Standard of Review

We review the dismissal of a claim under *FED. R. CIV. P. 12(b)(6) de novo. E.g., Gao v. Jenifer, 185 F.3d 548, 552 (6th Cir. 1999).* A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations. *Id.* Thus this Court must assume that all allegations are true and dismiss the claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," i.e., that the legal protections invoked do not provide relief for the conduct alleged. *Sistrunk v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996)* (quoting *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)); see also Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* In addition, "while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109-1110 (6th Cir. 1995)* (citing *Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993)).* "In practice, 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'" *Allard, 991 F.2d at 1240* (quoting *Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988)); see also Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir.)* (*per curiam*) (holding that the statement of mere legal conclusions is not entitled to liberal *Rule 12(b)(6)* review), *cert. denied, 484 U.S. 945, 98 L. Ed. 2d 360, 108 S. Ct. 333 (1987).*

B. Merits of the Equal Protection Claim

Golden's complaint asserts an equal protection claim in rather general terms: "Defendants . . . violated Plaintiffs' right to equal protection under the *Fourteenth Amendment* ...." J.A. at 12 (Compl. P 60). The pertinent factual

allegations are similarly general: "Defendants have established policies and customs and/or patterns and practices of requiring Plaintiffs and other consumers of and applicants for water service to comply with conditions different from similarly situated customers in order to restore water service, including but not limited to refusing to provide water service accounts to applicants who are not landowners." *Id.* (Compl. P 56). The City contends that the district court properly dismissed the claim because the only dissimilar treatment it can be read to allege is dissimilar treatment as between landlords and tenants. Because landlords and tenants are not similarly situated, the City's argument runs, Golden's complaint fails to state a claim upon which relief can be granted. It is true that the district court dismissed Golden's complaint in part on this basis. However, the remainder of the district court's analysis belies the City's contention that the complaint only alleges dissimilar treatment as between tenants and landlords.

The district court's opinion demonstrates that it dismissed Golden's claim on the assumption that the complaint alleged two forms of discrimination - first, as between tenants and landlords and, second, as between those tenants whose circumstances permitted them to enter direct billing agreements and those whose circumstances did not. *See* J.A. at 69-74. We think the district court's reading of the complaint was reasonable. Indeed, the parties apparently read the complaint in the same broad fashion; both parties briefed the tenant versus tenant classification as well as the tenant versus landlord classification in their motions before the district court. *See* J.A. at 111-15 (Defendant's Motion for Partial Dismissal), 208-10 (Plaintiff's Motion in response). In the end, the district court considered, and dismissed, Golden's equal protection claim under both theories. *See id.* at 69-74. We note that in the context of determining whether a *§ 1983* plaintiff has adequately pleaded the capacity in which she seeks to hold the defendant liable, we employ a "course of proceedings" test such that our interpretation of the complaint

will be informed by the manner in which the parties and the district court interpreted it. *Moore v. City of Harriman, 272 F.3d 769, 772-73 (6th Cir. 2001)* (*en banc*), *cert. denied, 536 U.S. 922, 153 L. Ed. 2d 776, 122 S. Ct. 2586 (2002)*. We decline, therefore, to accept the City's representation that Golden alleges dissimilar treatment as between two classes of tenants for the first time on appeal, *see* Brief of Appellee at 19, for this would be obviously inconsistent with the course of the proceedings so far. We read the complaint as alleging that the City treated two classes of tenants dissimilarly and two classes of residents, tenants and landlords, dissimilarly. We hold that, as to the former theory, Golden states a claim upon which relief can be granted under our case law.

Several circuits, including ours, have considered whether the *Equal Protection Clause* permits a municipality to deny water service to a residence where the prior inhabitant failed to pay water bills. *See O'Neal v. City of Seattle, 66 F.3d 1064 (9th Cir. 1995)*; *Ransom v. Marrazzo, 848 F.2d 398 (3d Cir. 1988)*; *DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986)*; *Sterling v. Vill. of Maywood, 579 F.2d 1350 (7th Cir. 1978), cert. denied, 440 U.S. 913, 59 L. Ed. 2d 462, 99 S. Ct. 1227 (1979)*; *Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976), aff'd on other grounds, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)*; *Davis v. Weir, 497 F.2d 139 (5th Cir. 1974)*. Because there is no fundamental right to water service, *see* discussion *supra* Part I; *see also Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993)*, we apply rational basis scrutiny to the City's water policy. *O'Neal, 66 F.3d at 1067*; *DiMassimo, 805 F.2d at 1541*.

Golden alleges that the City's policy irrationally treats one group of tenants (those whose landlords owe the City for water service) differently from another group of tenants (those whose landlords do not).[7] Brief of Appellant at 21.

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[7] Even if the prior tenant had a direct billing agreement with the City, the landlord is ultimately liable for any unpaid water bills.

According to Golden, the City's classification scheme has a determinative effect on a tenant's chances of securing water service. One class established by the City's policy is comprised of tenants who move into properties where there is no unpaid balance on the water account; these tenants will receive water service. The other class is comprised of tenants whose properties are encumbered by the water debts of the prior tenant; these tenants will be deprived of water service until they or their landlords, who are liable for the debt, pay the amount owed. Although it is true that *no* tenant in the City may establish a direct billing agreement with the City without first securing her landlord's consent, *see* Columbus City Code § 1105.045(D), Golden maintains that the City's policy nevertheless divides tenants in an irrational manner because it denies water service only to those tenants whose predecessors or landlords failed to pay the water bills. We agree.

This Court held nearly thirty years ago that a water service policy in Memphis, similar to the policy at issue here, violated water applicants' equal protection rights by irrationally dividing applicants into those who were permitted to contract for water and those who were not. *Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 689-90 (6th Cir. 1976), aff'd on other grounds, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978).* In *Craft*, the dividing line between applicants permitted to contract for service and applicants not permitted to contract was whether a water applicant's predecessor owed an unpaid balance at the property; if so, the applicant could not establish an account until the debt was paid. *Craft, 534 F.2d at 689.* In *Craft*, this Court relied on the then-contemporary Fifth Circuit case of *Davis v. Weir, 497 F.2d 139 (5th Cir. 1974)*, which invalidated an analogous Atlanta policy. *Davis, 497 F.2d at 144-45.* The *Davis* court concluded that "the Water works has divided those who apply

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Thus, any amounts owed to the City at the time that a new tenant moves in are owed by the landlord

for its services into two categories: applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges." *Id. at 144.* The court rejected Atlanta's defense that its policy facilitated the collection of unpaid bills at apartment buildings, holding that "the City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence - water." *Id. at 145.* The court acknowledged that Atlanta's policy facilitated debt collection but concluded that "[a] debt collection scheme . . . that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor." *Id. at 144-45.*

The *Davis* court's reasoning remains intact in the Fifth Circuit, was adopted by this circuit in *Craft*, and has been adopted by the Ninth and Seventh Circuits. *See O'Neal v. City of Seattle, 66 F.3d 1064, 1067-1068 (9th Cir. 1995); Sterling v. Vill. of Maywood, 579 F.2d 1350, 1355 (7th Cir. 1978).* At least one circuit, the Third, has rejected *Davis*, concluding that "the classification of service eligibility according to the presence or absence of encumbrances on the property survives rational relationship scrutiny" because while it may be an irrational means of collecting debt from the *debtor*, it is a rational way of accomplishing "the more general goal of collecting debts, period." *Ransom v. Marrazzo, 848 F.2d 398, 412-13 (3d Cir. 1988).* Having the benefit of both the Third and Fifth Circuits' approaches to consult, the Ninth Circuit "rejected the *Ransom* court's technical narrowing of the legislative purpose and agreed with the Fifth Circuit's opinion in *Davis*." *O'Neal, 66 F.3d at 1067-68.*

Even if we preferred the Third Circuit's approach to the question, we are bound by *Craft*, as that case is still good law in this circuit. Nevertheless, the City asserts that its

policy is materially distinguishable from those at issue in *Craft*, *Davis*, and *O'Neal*. The City contends that "the only classification [its policy] makes is between property owners and tenants." Brief of Appellee at 20. According to the City, all tenants are treated equally since all tenants must obtain their landlords' consent before establishing a direct billing agreement. The City further argues that its policy does not require tenants to pay bills for which they are not liable; instead, the policy imposes financial liability on landlords only. These points, while true, are irrelevant. The critical issue is whether terminating a tenant's water service is a rational means of collecting the landlord's water service debt. We hold that it is not.

We do not see a meaningful distinction between the policy before us and those held unconstitutional in *Craft*, *Davis*, *Sterling*, and *O'Neal*. Moreover, to the extent there are distinctions, we see no reason to depart in this case from the Fifth Circuit's rationale in *Davis* - a rationale which we adopted as our own in *Craft*.[8] In practical terms, as Golden's own experience shows, the City's policy works as follows. A tenant moves into an apartment; water is available at the time the tenant moves in, so there is no reason for the tenant to question its future availability. However, at some point later the City terminates water service to the residence for the sole reason that the landlord owes the City for the prior tenant's water usage. When the new tenant inquires with the City, she learns that water service will recommence only once her landlord has satisfied the debt that he alone owes. This is a debt collection scheme "that divorces itself entirely from the

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[8] In addition, we are not persuaded by the Eleventh Circuit's equal protection rationale in *DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1989)*, a case the City urges us to follow. In *Dimassimo*, the court rejected an equal protection claim similar to Golden's. The Eleventh Circuit did not consider our opinion in *Craft*, nor the Fifth Circuit's opinion in *Davis*. For the reasons stated in our discussion, we adhere to those opinions.

reality of legal accountability for the debt involved," *Davis, 497 F.2d at 144-45*, because the person directly penalized by the scheme is not the debtor but an innocent third party with whom the debtor contracted.

The City submits that because the policy does not explicitly require tenants to pay their predecessors' debts, but instead imposes that obligation on landlords, it is constitutional. Whether the City's goal is that it be repaid by the person who owes the debt or by the tenant who is directly affected by its collection scheme is immaterial for constitutional purposes. Neither goal gives "the City license to pursue payment by refusing water service to an unrelated, unobligated third party, whether that third party be the new tenant or any other stranger to the prior service agreement." *O'Neal, 66 F.3d at 1068*. We conclude, as the Ninth Circuit did in *O'Neal*, that "pursuing payment from the prior tenant and the landlord would be rationally related to the City's goal; refusing service to an unobligated new tenant is not." *Id.* To be sure, the City has at its disposal various means to recover from the landlord or the prior tenant without jeopardizing the new tenant's water service. In fact, after the events that prompted Golden to bring this action, the City implemented one obvious approach. Under a rule adopted by the Director of Public Utilities, tenants facing termination of water service - or, we may assume, seeking to reinstate service already terminated - may pay their rent into an escrow account maintained by the Municipal Court for Franklin County. We express no opinion as to whether the particulars of this new rule[9] pass constitutional muster;[10] we refer to it only to

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[9] A 2002 version of the rule is reprinted in the Joint Appendix. *See* J.A. at 603-605 (City of Columbus Dep't of Pub. Utils. Rule and Regulation No. 2002-01).

[10] Neither do we construe this new rule as mooting the present controversy. We have no way of knowing whether the new rule is permanent or temporary and the City does not contend that it moots

illustrate that cities in this circuit are not without means to recover water service debts merely because the *Equal Protection Clause of the Fourteenth Amendment* bars them from terminating the water service of a tenant whose landlord owes water bills.

III. Equal Credit Opportunity Act

A. Standard of Review

The district court granted summary judgment to the City on Golden's ECOA claim. We therefore review the district court's judgment on this point *de novo*. *E.g., Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 (6th Cir. 2001)*. In addition, we view the relevant facts in the light most favorable to Golden. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

B. Merits of the ECOA Claim

Golden asserts that the policy, which authorizes direct billing of a tenant only if (1) the landlord agrees in writing

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Golden's equal protection claim. As a general rule, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2002)* (quoting *Friends of the Earth, Inc., v. Laidlaw Environmental Servs., Inc., 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)*). "[A] heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Adarand Const., Inc. v. Slater, 528 U.S. 216, 222, 145 L. Ed. 2d 650, 120 S. Ct. 722 (2000)*. Because the City does not assert mootness, it follows that its adoption of the new rule does not moot Golden's equal protection claim.

and (2) any existing balance on the account is immediately paid, violates the ECOA, *15 U.S.C. § 1691(a)(1)*. Golden's theory of liability is that the policy has the effect of rejecting a higher proportion of female and minority applicants for water service than other applicants. *See* Brief of Appellant at 24. This theory is based on the findings of Golden's expert witness to the effect that women and minorities are under-represented in the population of homeowners in the City. According to Golden, because the policy permits only homeowners to directly contract for water service, the policy has a disparate impact on anyone who is under-represented among homeowners. The district court assessed the statistical evidence furnished by the expert in support of Golden's disparate impact claim and concluded that this evidence did not make the type of comparison necessary to state such a claim. Finding that Golden had failed to make out a *prima facie* case of disparate impact discrimination, the court granted summary judgment to the City. We affirm.

The ECOA provides, in relevant part: "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color . . . sex or marital status." *15 U.S.C. § 1691(a)(1)*. We make the following assumptions for purposes of resolving Golden's ECOA claim. First, we assume that Golden is an applicant, that the City is a creditor, and that a transaction for water service is a credit transaction. Second, we assume that disparate impact claims are permissible under ECOA.[11]

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[11] Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are. *196 F.R.D. 315, 325-26 (M.D. Tenn. 2000), modified on other grounds, 296 F.3d 443 (6th Cir. 2002)* (discussing cases in the federal district courts, one court of appeals case, and ECOA's legislative history and concluding that "there is clear support for the use of a disparate impact theory in an ECOA case"). *See also* S. Rep. No. 94-589 (instructing that "judicial constructions of anti-discrimination legislation in the

To prove her claim that the City's policy has a disparate impact on women and minorities, Golden must show that the policy "has a significantly greater discriminatory impact on [women and minorities]." *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997) (citation omitted). The conventional way to do this is "to compare representation of the protected class in the applicant pool with representation in the group actually accepted from the pool." *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1030 (N.D. Ga. 1980). "If the statistical disparity is significant, then [the] plaintiff is deemed to have made out a *prima facie* case." *Id.* In some cases, a plaintiff may rely on general population characteristics if it is reasonable to assume that the applicant pool is representative of the general population. However, "this assumption is not valid in every case. Plaintiff must demonstrate why the use of general population statistics would be valid." *A.B. & S. Auto Service, Inc.*, 962 F. Supp. at 1061 (citing *Cherry*, 490 F. Supp. at 1031 n. 9).

From what we are able to discern, Golden has not attempted to identify the actual applicant pool for water service in Columbus and has instead relied upon characteristics of the City's general population. As just mentioned, this approach is permissible in cases where the plaintiff demonstrates that any possible applicant pool would be representative of the population as a whole. Golden has not offered evidence or argument on this score. Golden relies on the work of an expert whose conclusion that the City's policy has a disparate impact on women and minorities depends on which groups of residents he chose to compare. Without explanation or citation to authority, Golden contends

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employment field," such as in cases where the Supreme Court has sustained disparate impact claims, should serve as guidelines in ECOA cases); Gwen A. Ashton, *The Equal Credit Opportunity Act from a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN.REV.BANKING L. 465, 478-81 (1998).

that it was appropriate for the expert to compare the demographics of all renters to the demographics of all homeowners as a proxy for a comparison between the actual pool of applicants for water service in Columbus and the subset of the pool who succeed in securing service. We disagree.

The parties agree on two critical points: first, in order to be eligible to apply for water service, an applicant must live in a residential unit - whether a house or an apartment - that has its own water meter; and, second, those eligible to apply for water service without needing to secure anyone else's approval include not only people who own residences with water meters but also those who live with people who own residences with water meters.[12] In reality, then, the applicant pool for water service in the City of Columbus is comprised of people who either rent a residence with a water meter, own such a residence, or live with someone who owns such a residence. Those who, all things being equal, will secure water service from the City without having to obtain another's approval are people who either own a residence with a water meter or live with the owner of such a residence. If there were a statistically significant disparity between the representation of women and minorities in the first group and their representation in the second group, a finding that the policy has a disparate impact on women and minorities would be appropriate. *E.g., Cherry, 490 F. Supp. at 1030.* The expert's statistics do not address this question, however. The expert's comparison between all renters and all homeowners does not indicate one way or the other whether the proportion of women and minorities in the actual applicant pool is larger, in a statistically significant sense, than the proportion of women and minorities in the group of successful applicants.

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[12] The City denominates people who own residences with water meters as "heads of households." Golden does not dispute that the City contracts with people who live with heads of households, e.g., spouses of heads of households.

Moreover, Golden does not attempt to explain why the group of all renters is an accurate proxy for the actual applicant pool and the group of all homeowners an accurate proxy for the group of successful applicants for water service. We need not inquire further because the law requires Golden to proffer such an explanation. *See A.B.& S. Auto Serv., Inc., 962 F. Supp. at 1062* (observing that plaintiff must show that the actual applicant pool bears "approximately the same characteristics as the general population surveyed"). We note parenthetically, however, that the group of all renters is obviously over-inclusive if designed to serve as a useful proxy for the actual applicant pool because it includes many renters who live in a large subset of residences that do not have individual water meters, i.e., apartments. In this respect, the expert's approach was not sensitive to a baseline qualification all applicants for water service in Columbus must meet. As the Supreme Court has said in the context of employment discrimination, "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977).* In addition, the expert's proxy for the group of successful applicants, i.e., all homeowners, is under-inclusive because it excludes a group of residents who are eligible to apply for water service without having to obtain approval from another, i.e., those who live with owners of residences that have water meters.

With these points in mind, we conclude that the comparison relied upon by the expert in fashioning Golden's disparate impact claim does not, at least not in a discernible way, indicate that the City's policy has a disparate impact on women and minorities. Since Golden does not attempt to illuminate any hidden meaning the expert's comparison may have, we must affirm the district court's grant of summary judgment to the City.

IV. Class Certification

A. Standard of Review

We review a district court's denial of class certification for abuse of discretion. *Alkire v. Irving, 330 F.3d 802, 810 (6th Cir. 2003)*; *In re Am. Med. Sys., 75 F.3d 1069, 1079 (6th Cir. 1996)*. As the party seeking class certification, Golden bears the burden of proof. *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)*; *In Re American Med. Sys., Inc., supra, at 1079*.

B. Merits of the Class Certification Claim

As we reiterated recently, "in order to obtain class certification, [a] plaintiff must first satisfy *Rule 23(a)*'s requirements of numerosity, commonality, typicality, and adequacy of representation." *Coleman v. GMAC, 296 F.3d 443, 446 (6th Cir. 2002)*. The district court concluded that Golden failed to prove numerosity. *FED. R. CIV. P. 23(a)(1)*. This conclusion was not an abuse of the court's discretion; we therefore affirm.

To prove numerosity, Golden must demonstrate that the putative class is "so numerous that joinder of all members is impracticable." *FED. R. CIV. P. 23(a)(1)*. We have observed that "there is no strict numerical test for determining impracticability of joinder." *In Re American Med. Sys., Inc., 75 F.3d at 1079* (citing *Senter v. Gen. Motors Corp., 532 F.2d 511, 523 n.24 (6th Cir.), cert. denied, 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976)*). Indeed, "the numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Northwest, Inc., v. EEOC, 446 U.S. 318, 330, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980)*. Nevertheless, while "the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown, and cannot be speculative." *McGee v. East Ohio Gas Co., 200 F.R.D. 382, 389 (S.D. Ohio 2001)* (quotation and citations omitted); *see also* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

PROCEDURE § 1762 (3d Ed. 2001) (observing that the party seeking class certification "bears the burden of showing impracticability and mere speculation as to the number of parties involved is not sufficient to satisfy *Rule 23(a)(1)*").

With respect to Golden's equal protection claim - the only claim we sustain - the putative class of plaintiffs consists of tenants in Columbus whose water service was or will be terminated because of the landlord's or prior tenant's indebtedness. J.A. 9-10 (Compl.); 91 (Motion for Class Cert.). As proof of impracticability of joinder, Golden relies exclusively on one figure - the number of renters in Columbus, which, according to Golden, is 150,000. We have no reason to question this figure but we agree with the district court that merely referring to it does not suffice for purposes of proving numerosity under *Rule 23(a)(1)*. Golden must offer something more than bare speculation to link the gravamen of her claim for liability to the class of individuals she purports to represent. The gravamen of Golden's equal protection claim is that the City irrationally terminates certain tenants' water service. Golden does not allege that *all* tenants in Columbus are at risk of constitutional harm, only those whose predecessors or landlords are indebted to the City. Thus, reference to the total number of tenants in Columbus is not probative of the number of tenants reasonably likely to face the harm for which Golden seeks redress. Of course, the total number of tenants in Columbus is probative in the very limited sense that it represents the absolute maximum number of plaintiffs that could be in any class action brought by a tenant against the City. But the district court must engage in a "rigorous analysis" when evaluating the plaintiff's proof of numerosity, *see Falcon, 457 U.S. at 161*. We cannot say the district court abused its discretion in concluding that such an unrefined measure as the total tenant population in Columbus is too speculative for purposes of the numerosity requirement. *See Alkire, 330 F.3d at 820* (holding that the plaintiff's hypothesis that hundreds of people might be unconstitutionally incarcerated for failure to pay civil debts or

court costs was insufficient to prove numerosity); *Gevedon v. Purdue Pharma, 212 F.R.D. 333, 337-38 (E.D. Ky. 2002)* (holding, in a products liability case, that the total sales volume of the product in question is not in itself sufficient proof of numerosity).

Accordingly, we affirm the district court's denial of Golden's motion for class certification.

CONCLUSION

We AFFIRM the district court's grant of summary judgment to the City with respect to Golden's claims under the ECOA and the *Due Process Clause of the Fourteenth Amendment*. We similarly affirm the court's denial of the motion for class certification. However, we REVERSE the district court's dismissal of Golden's equal protection claim. Accordingly, we remand for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Case No. C2-01-710

NIKKI MARA, ET AL.,
PLAINTIFFS,

V.

CITY OF COLUMBUS, ET AL.,
DEFENDANTS.

Memorandum Opinion and Order

Plaintiff Hazel Golden brings this 42 U.S.C. § 1983 action against the City of Columbus ("the City"); the Department of Public Utilities, Division of Water ("Division of Water"); and John R. Doutt, director of the Department of Public Utilities, in both his individual and official capacities. Plaintiff claims that defendants violated her right to due process of the law and the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff asserts a claim under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, *et seq.* Finally, plaintiff alleges that the Division of Water violated its common law duty as a public utility to serve a member of the public. This matter is before the court on defendants' motion for partial dismissal and partial summary judgment. (Doc. 9). This motion is ripe for ruling.

I. Procedural and Factual Background

A. Procedural Background

This suit was initiated by Nikki Mara and Hazel Golden. The plaintiffs moved for class certification, but that motion was denied on March 7, 2002. *See* Doc. 27.

On February 15, 2002 plaintiffs' counsel, the Equal Justice Foundation, moved for leave to withdraw as counsel for Mara because she apparently moved from her address but

failed to inform plaintiffs' counsel both that she was moving and of her forwarding address. Despite repeated attempts to contact Mara, plaintiffs' counsel has had no contact with her since at least September 27, 2001. On March 28, 2002 Magistrate Judge Abel granted the motion of plaintiffs' counsel, and gave Mara thirty days within which to obtain new counsel or file a notice stating her intent to represent herself. The clerk mailed this order to Mara's last known address, but it was returned by the United States Postal Service because she no longer resided at that address.

The court construes Mara's failure to inform her attorneys or this court of her forwarding address and her failure to communicate with her attorneys since September, 2001 as an abandonment of her claims. Accordingly, Mara is dismissed as a plaintiff in this action.

B. Factual Background

The remaining plaintiff, Golden, began renting her residence, located in Columbus, Ohio on or about January 17, 2001 and has resided there at all relevant times. In addition to serving as her residence, plaintiff also operates her business, Golden's Washing and Painting Service, from the property. According to the complaint, plaintiff's lease states that the water-service bill is the tenant's responsibility, but she alleges that her landlord did not sign a tenant direct-billing agreement with the Division of Water until March 16, 2001. Plaintiff does not allege that she contacted the Division of Water when she moved into the residence or ever ensured that her landlord had done so.

In February, 2001 the Division mailed a water-service bill to plaintiff's residence for water service that had been provided to the previous tenant, Sara Dean, who had not resided at the residence since at least January 17, 2001. The bill was in Dean's name. Plaintiff acknowledges receiving the bill, but, according to the complaint, she did not contact the Division of Water to inform it that she was now residing at the property or to inquire about the bill.

On March 8, 2001 plaintiff's water service was

"interrupted," or terminated, as a result of unpaid water-service charges. According to the complaint, the notice that was left on plaintiff's door prior to or contemporaneous with the water-service interruption did not inform plaintiff of her right to contest or appeal the service interruption, but instead stated that full payment was required to avoid the service interruption or to restore service.

Defendants contend that the delinquent bills sent to plaintiff's address and the delinquency notices left at her address both informed her of her right to a pre-interruption hearing. A review of the record, which includes copies of these bills and notices, reveals that they do contain information about the right to a pre-termination hearing. *See* Defendants' Motion, Young Aff., Exhs. F-J. The court notes that the bills and delinquency notices are in the name of Sara Dean. Defendants contend, however, that all bills, delinquent notices, and turn-off notices are sent in envelopes with the following message displayed: "This Is Your Water Bill." *See* Defendants' Motion, Young Aff. at ¶ 6 & Exh. A.

Plaintiff alleges that after the March 8, 2001 interruption, she contacted the Division of Water and informed it that she was the current resident and was not liable for Dean's unpaid balance, but was willing to pay for her own water usage. According to the complaint, the Division of Water employee to whom plaintiff spoke did not inform her that she had a right to a hearing to contest the termination of the water service, but instead stated that the service would not be restored until she paid the outstanding balance.

Thereafter, plaintiff contacted the Office of Code Enforcement ("Code Enforcement"), which had the water service restored to her residence because the lack of water presented an immediate safety risk.

The water service was interrupted again on April 3, 2000 with the same result, and again on April 23, 2000 but with a different result. According to the complaint, after the April 23, 2000 water-service interruption, Code Enforcement

did not cause the water service to be restored, but instead informed plaintiff that she would have to vacate her residence because without running water it would be considered uninhabitable. The complaint does not state, however, if plaintiff was required to or did in fact vacate her residence.

It is undisputed that pursuant to Columbus City Code ("Code") § 1105.045, the City will establish a water-service account in the name of property owners only; the City will not establish accounts in the names of rental tenants. The City will provide direct billing to a tenant if both the tenant and landlord sign a direct billing agreement. Even when a direct-billing agreement is in effect, the property owner is ultimately responsible for the property's water-service account, and the Division of Water will simultaneously mail to both the landowner and the tenant copies of any bills and notices concerning delinquent water-service charges.

II. Discussion

In her first cause of action, plaintiff alleges that defendants, pursuant to established custom and policy, violated her right to procedural due process because they terminated her water service without affording her prior notice or a meaningful opportunity to contest the termination of the water service. Plaintiff claims, in her second cause of action, that defendants likewise have an established policy and custom of treating water-service customers who do not own their residences different from applicants or customers who own their residences, thereby violating her right to equal protection of the law. The third cause of action is plaintiff's claim that the Division of Water violated its "common law duty to serve." Finally, in her fourth cause of action, plaintiff alleges that the City's policy of not contracting with non-landowners violates the ECOA.

Plaintiff seeks compensatory and punitive damages. Specifically, she seeks damages associated with her inability to operate her business as a result of the water interruption, damages incurred as a result of having to obtain alternative sources of water, and damages for the emotional distress she

suffered as a result of the threat of "imminent homelessness."

In addition, plaintiff seeks a declaration that defendants' practices violate principles of equal protection, due process, and state law; and she seeks a permanent injunction preventing defendants from: (1) terminating water service without prior notice and a meaningful opportunity to contest termination; and (2) terminating or refusing to establish water service because of charges incurred by anyone other than the consumer of or applicant for water service.

A. Motion to Dismiss

Defendants move to dismiss the following claims and to dismiss this action as to the following defendants for failure to state a claim for relief pursuant to Fed. R. Civ. P. 12(b)(6): (1) all claims against the Division of Water; (2) all claims against Doutt in his personal capacity; and (3) the second, third, and fourth causes of action.

1. Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed for failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief. *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978).

A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88 (6th Cir. 1997). The court is not required to accept as true unwarranted legal conclusions or factual inferences. *Morgan v. Church's Fried Chicken*,

829 F.2d 10 (6th Cir. 1987).

2. Claims against the Division of Water

Defendants argue that all claims against the Division of Water should be dismissed because it is not a "person" capable of being sued. Plaintiff does not contest defendants' assertion, nor does she object to the dismissal of the Division of Water.

Plaintiff's concession is appropriate inasmuch as the Division of Water is not an independent entity, but instead is a sub-unit of the City and therefore is not *sui juris*. *See Papp v. Snyder*, 81 F. Supp. 2d 852, 857 n.4 (N.D. Ohio 2000); *Williams v. Dayton Police Dep't*, 680 F. Supp. 1075, 1080 (S.D. Ohio 1987). This branch of defendants' motion is granted. The Division of Water is dismissed as a defendant in this action.

3. Claims against Doutt in his Personal Capacity

Defendants argue that plaintiff's complaint fails to allege facts sufficient to state a claim against Doutt in his personal capacity. Defendants' argument is well-taken.

The difference between personal-capacity[1] actions and official-capacity actions is well established. "Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law" whereas official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). In order to establish personal liability in a § 1983 action, the complaint must allege sufficient facts showing that the official, acting under color of state law, caused the deprivation of a federal right. *See id.* at 166; *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991). Plaintiff has failed to allege sufficient facts to make such a showing.

The substance of plaintiff's allegation against Doutt is set forth in paragraph eight of her complaint, which states:

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[1] Personal-capacity actions are commonly referred to as individual-capacity actions.

> Defendant John R. Doutt is the director of the Defendant City of Columbus Department of Public Utilities. He has decision making authority for defendants regarding termination of water service. He knew, or should have known, that Sixth Circuit law and all other applicable law required defendants to provide adequate notice and appeal procedures, both before and after termination of services, and forbade termination or denial of water service based on charges allegedly owed by third parties.

Complaint at ¶ 8. In this paragraph, and in the remainder of the complaint, plaintiff does not allege that Doutt *personally* caused the deprivation of any of her federal rights. Accordingly, plaintiff's personal-capacity action against Doutt fails to state a claim upon which relief can be granted. *See Graham*, 473 U.S. at 166. This branch of defendants' motion to dismiss is granted.

4. Equal Protection Claim

The allegation giving rise to plaintiff's equal protection claim is contained in paragraph fifty-six of the complaint, which states:

> Upon information and belief, Defendants have established policies and customs and/or patterns and practices of requiring Plaintiff[] and other consumers of and applicants for water service to comply with conditions different from similarly situated customers in order to restore water service, including but not limited to refusing to provide water service accounts to applicants who are not landowners.

Complaint at ¶ 56; *see also* Memorandum Contra at p. 5 ("Defendants do not allow any tenant to hold water service in his or her name; instead, the service must be in the name of the property owner. Defendants are thus distinguishing between landlords and tenants and claim that there is a rational basis for this"). The court construes plaintiff's equal protection claim as alleging that the City's practice of not allowing tenants to establish water-service accounts in their

own name offends the Equal Protection Clause of the Fourteenth Amendment. For the reasons set forth below, plaintiff's claim is unavailing.

Inasmuch as the City's policy affects only economic interests, as opposed to fundamental constitutional rights, any classification created by the policy "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Put differently, the court must undertake a rational basis review of the policy. *See id.*; *O'Neal v. City of Seattle*, 66 F.3d 1064, 1067 (9th Cir. 1995) (applying rational basis analysis to plaintiff's claim that city's water-service policy violated principles of equal protection); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 690 (6th Cir. 1976) (same); *Davis v. Weir*, 497 F.2d 139, 144 (5th Cir. 1974) (same).

Plaintiff argues that because water is a necessity of life it is therefore a "fundamental" need and therefore the City must have a compelling reason for treating landowners and non-landowners differently. Plaintiff's argument is without merit. The Sixth Circuit has specifically rejected the notion that the provision of water and sewer services by a municipality is a federally-protected right giving rise to a substantive due process right. *See Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476-77 (6th Cir. 1993) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir. 1988)). Inasmuch as the receipt of water from a municipality is not a federally protected right, it is not a fundamental right requiring strict scrutiny analysis.

Under the rational basis analysis, the court must determine whether the policy bears a rational relationship to a legitimate state interest. *See O'Neal*, 66 F.3d at 1067. If there are plausible reasons for the policy, the court's inquiry ends. *See Beach Communications*, 508 U.S. at 313-14. The *Beach Communications* Court instructed further that under rational basis review, the legislative policy is afforded a

strong presumption of validity and that the plaintiff bears the burden of negating "every conceivable basis which might support it." *Id.* at 314-15 (internal quotation marks omitted). The Equal Protection Clause does not grant to courts a license "to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313.

Defendants contend that distinguishing landowners from non-landowners, such as rental tenants, is rationally related to the legitimate governmental goal of ensuring that the ultimate responsibility for water-service bills resides with the individual who has property against which a lien may be sought and thereby satisfy any debt owed to the City. The court agrees.

The instant matter is similar to the situation before the Eleventh Circuit in *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1986). In *DiMassimo*, the city provided utilities only to landowners or to tenants who had both the landowner's permission to request that utilities be provided to them and the landowner's agreement that he would retain ultimate responsibility for all utility service charges. Plaintiffs claimed that this policy violated, *inter alia*, their equal protection rights. The Eleventh Circuit affirmed the district court's holding that the city's policy did not violate the Equal Protection Clause.

The Eleventh Circuit held that a "landowner and [a] tenant are so dissimilarly situated that they may be treated differently under the City's ordinances without offending the Fourteenth Amendment's equal protection clause." *Id.* at 1542. In discussing the rational basis analysis, albeit in the context of plaintiffs' substantive due process claim, but equally apposite to the equal protection claim, the court held that the city's ordinances met the rational basis standard "because a landowner, whose property is readily subject to liens and foreclosure may be rationally presumed to be more readily held to account as the ultimate guarantor of the bills than a tenant who may freely abandon the lease, leaving behind only his outstanding debts." *Id.* at 1541. The court

noted further that "[a] financial deposit sufficient to provide the City with the same degree of security [as property] would indeed be burdensome to any potential tenant." *Id.* at 1542. The court held, therefore, that the city had a legitimate interest in requiring the landowner to either apply directly for utilities or to authorize the city to contract with the tenant, while retaining ultimate responsibility for the utility charges.

This court likewise concludes that landowners and tenants are so dissimilarly situated that the City's policy of contracting only with landowners passes muster under rational basis analysis. As stated, the Division of Water will provide direct billing to the tenant provided the landlord agrees, but under all circumstances the landowner remains ultimately responsible for any water-service charges. This policy is rationally related to the legitimate interest in maintaining a financially stable municipal utility. Again, as noted in *DiMassimo*, "a landowner, whose property is readily subject to liens and foreclosure may be rationally presumed to be more readily held to account as the ultimate guarantor of the bills than a tenant who may freely abandon the lease, leaving behind only his outstanding debts." *Id.* at 1541; *see also Mansfield Apartment Owners Ass'n*, 988 F.2d at 1477-78 (holding that the city's policy of holding landowners responsible for outstanding water-service bills satisfied rational basis test because passing ultimate responsibility onto landowner "is a reasonable regulation aimed at keeping the water system financially solvent").

For the foregoing reasons, the City's policy of contracting for water-service accounts with landowners only does not violate a non-landowner's right to equal protection of the law as guaranteed by the Fourteenth Amendment.

There is a line of cases holding that a city that refuses to allow an individual, including rental tenants, to establish new water service if the contemplated property is encumbered by pre-existing debt (for which the applicant is not responsible) violates the Equal Protection Clause because it creates two classes of applicants for which there is no rational

basis, to wit: (1) applicants whose contemplated service address is encumbered with a pre-existing debt; and (2) applicants whose residence lacks the stigma of such charges. *See O'Neal*, 66 F.3d at 1067-68; *Craft*, 534 F.2d at 689-90; *Davis*, 497 F.2d at 139. In *Craft*, the Sixth Circuit held that the city lacked a rational basis for drawing such a distinction between these two groups of utility-service applicants because:

> [A] collection scheme that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence – water.

Craft, 534 F.2d at 690 (quoting *Davis*, 497 F.2d at 144-45).

This line of cases is inapposite to the instant matter. This is not a case in which the City's policy creates two classes of similarly-situated applicants, one which the City will contract with and one with which the City will not. As stated, the City refuses to provide water-service accounts to all non-landowners, who are dissimilarly situated from landowners.

In summary, the City's policy of refusing to contract with non-landowners for water service does not violate plaintiff's right to equal protection of the law as guaranteed by the Fourteenth Amendment.

5. Equal Credit Opportunity Act Claim

Plaintiff claims that the City's policy of providing water-service accounts only to landowners violates the ECOA, 15 U.S.C. § 1691, *et seq.*, because the policy results in a "disparately high rejection of applications from women and minority applicants." Complaint at ¶ 63. It appears that plaintiff seeks to establish her claim under a disparate impact theory, which is actionable under the ECOA. *See* 12 C.F.R.

§ 202.6, App. D. Staff Interpretations § 202.6-6(a)(2). Plaintiff has alleged sufficient facts to withstand defendants' motion to dismiss. Accordingly, this branch of defendants' motion is denied.

6. State Common Law Duty to Serve

In her breach of the duty to serve claim, plaintiff alleges that the Division of Water violated its duty to serve because it terminated her water service in an arbitrary and unreasonable manner. Complaint at ¶ 61. In her memorandum contra, plaintiff also claims that the termination of her water service was discriminatory in nature. Although the Department of Water has been dismissed as a defendant, plaintiff argues that the City owes her a duty to serve and is therefore liable for breaching that duty.

The court need not determine whether the City has such a duty, however, because this court does not have jurisdiction to entertain this claim. In a recent opinion, Judge Marbley of this court determined that pursuant to Ohio Rev. Code § 4905.26, Ohio's Public Utility Commission ("PUCO") has exclusive jurisdiction to hear claims of this nature. *See McGee v. East Ohio Gas Co.*, No. 99-CV-813, 2002 WL 484480, at *7-8 (S.D. Ohio Mar. 26, 2002) ("While it may be true that, at some point in history, the duty to serve was a common law duty, Title 49 appears to have superseded the common law"). For the reasons set forth in Judge Marbley's well-reasoned opinion, this court concludes that the PUCO has exclusive jurisdiction to entertain plaintiff's duty to serve claim. Accordingly, this branch of defendants' motion to dismiss is granted.

B. Motion for Partial Summary Judgment

Plaintiff claims that defendants terminated her water service without affording her prior notice or a meaningful opportunity to contest the termination, thereby violating her right to procedural due process as guaranteed by the Fourteenth Amendment. Defendants move for summary judgment on this claim, arguing that they provided plaintiff with adequate pre-deprivation process. The court need not

determine whether plaintiff was afforded adequate due process because, as explained below, it finds that she did not have a "property" interest in the water service that was being delivered to her residence.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curium). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact in the case at issue, *LaPointe*, 8 F.3d at 378, which may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993). In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). *See generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-53). The evidence,

all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). *See also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. *See also Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

"The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of . . . property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

In their motion for summary judgment, defendants did not argue that plaintiff had no property interest in the water service. Inasmuch as this requirement is a predicate to any procedural due process analysis, the court raised this issue by way of an Order requiring both parties to address the issue. After reviewing the parties' supplemental briefs and the applicable case law, the court concludes that plaintiff did not have a property interest in the water service.

In *Roth*, the Supreme Court held:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [S]he must have more than a unilateral expectation of it. [S]he must, instead, have a legitimate claim of entitlement to it . . . . Property

> interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. The Court suggested two sources that create property interests – state statutes or contracts, express or implied, between the individual and the state. *See id.* at 577-78. For the reasons set forth below, the Code does not provide plaintiff with a legitimate claim of entitlement to water service, nor was there any contractual relationship between the Division of Water and plaintiff.

It is plaintiff's contention that the Code conferred upon her a property interest in water service to her residence. This contention is without merit.

Plaintiff argues that the source of her property interest in water service is found in section 1101.03 of the Code, which governs the termination of water service. Specifically, plaintiff relies on the following portion of section 1101.03:

> The notice [of termination] shall also indicate the hearing rights afforded to any person affected by the termination notice by which the person may contest the water service termination.

§ 1101.03(b). Plaintiff also relies on the definition of "affected person" found in section 1101.03:

> "[A]ffected person" shall include, but is not limited to, an owner, occupant, resident or tenant of the affected property.

§ 1101.03(c). Plaintiff argues, without support, that the availability of a hearing presupposes a property interest. That the Division of Water provides an affected person the right to a hearing does not, in and of itself, create a legitimate claim of entitlement to water service to someone affected by the termination of water service. Further, to the extent that plaintiff relies on the fact that she falls within the definition of "affected person" to support her claim that section 1101.03

provides her with a property interest, such reliance is misplaced. *See Marrero-Garcia v. Irizarry*, 33 F.3d 117, 123-24 (1st Cir. 1994) (rejecting plaintiff's argument that a regulatory definition was sufficient to establish a property interest in continued water service).

The Code specifically requires that the City charge a fee for providing water service. *See* Code, Charter §§ 118 & 119. It follows that a person who has not agreed to pay for water service is not entitled to receive water service under the Code. Therefore, the plaintiff, a non-customer of whom the Division of Water was not even aware, cannot rely on the Code as the source of a property right in water service.

The second source of a property right recognized by the *Roth* Court is a contract, express or implied, between the individual and the state. Plaintiff has not argued that she had any contractual relationship with the Department of Water. Any such argument would be remarkable inasmuch as plaintiff never informed the Division of Water that she was residing at her residence until the water service was terminated on March 8, 2001, despite having lived there for 2 months, during which time she acknowledges receiving water bills, albeit in the name of the former tenant. Plaintiff alleges that her landlord signed a direct-billing agreement on March 16, 2001, but she does not allege, nor is there any evidence to indicate, that this agreement was ever forwarded to the Division of Water.[2]

Plaintiff has neither a contractual nor a statutory basis to support her claim that she had a constitutionally-protected property interest in the water service to her residence. Because plaintiff has neither of these bases to support her claim, the court concludes as a matter of law that as a non-

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[2] Because there is no evidence that plaintiff, her landlord, and the City ever entered into a direct billing agreement, the court need not determine whether such an agreement would constitute a contract that creates a property interest in the continuation of water service.

customer, of whom the Division of Water was not aware, she did not have a legitimate claim of entitlement to water service. Plaintiff's "mere receipt of water for [two months] could not unilaterally create a legitimate claim of entitlement." *Coghlan v. Starkey*, 845 F.2d 566, 570 (5th Cir. 1988) (finding that the receipt of water service for *several years* did not unilaterally create a legitimate claim of entitlement).

In her supplemental brief, plaintiff argues that mere *use*, without more, of a public utility creates a legitimate claim of entitlement to the continued utility service. This argument is without merit. In support of her argument, plaintiff cites the Supreme Court's decision in *Craft*. The issue in Craft was what process was due to utility *customers* before their service could be terminated. Notwithstanding the fact that the plaintiffs in *Craft* were actual customers of the utility company, it is plaintiff's contention that the holding is not limited to just customers of a public utility, and in support she quotes a passage from the decision as follows: "'public utilities . . . are obligated to provide service to *all the inhabitants* of the City of its location alike, without discrimination, and without denial, except for good and sufficient cause.'" Plaintiff's Supplemental Memorandum at pp. 1-2 (quoting *Craft*, 436 U.S. at 11). Plaintiff's interpretation of *Craft* is erroneous.

Neither the holding in *Craft*, nor any statement therein, supports an argument that all inhabitants of a city are entitled to free water service. The complete passage of the opinion selectively quoted by plaintiff illustrates this point: "MLG&W and other public utilities in Tennessee are obligated to provide service to all inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause, and may not terminate service except for nonpayment of a just service bill[.]" *Craft*, 436 U.S. at 11 (internal quotations and citations omitted). That a Tennessee public utility may deny service to its inhabitants for good cause and may terminate service for

nonpayment of a just service bill demonstrates that the public utility is under no obligation to provide utility service to all residents free of charge, but instead provides such service only to those who pay, i.e., customers. Accordingly, the *Craft* decision does not stand for the proposition that a public utility must provide service to all residents of the city regardless of whether they pay for the service, and correspondingly, the decision does not support the argument that all residents of a city have a property interest in a public utility's service just by residing in the city.

In further support, plaintiff relies on the Sixth Circuit's decision in *Mansfield Apartment Owners Ass'n*, 988 F.2d 1469. Plaintiff contends that the *Mansfield Apartment Owners Ass'n* court, relying on *Craft*, did not limit property interest in public utilities to customers. Specifically, plaintiff relies on the following statement: "the expectation of utility services rises to the level of a 'legitimate claim of entitlement' . . . ." *Id.* at 1474 (citing *Craft*, 436 U.S. 1). The *Mansfield Apartment Owners Ass'n* decision does not alter this court's conclusion that plaintiff herein had no property interest in the water service delivered to her residence.

The aggrieved party in *Mansfield* consisted of an apartment owners' association who challenged the city's policy of refusing to provide water service to landlords, who as the property owners, were ultimately responsible for the water-service charges attributed to their property, until the delinquent accounts of their former tenants were paid. There was no analysis of whether the apartment owners had a property interest in the water service, but instead the court simply stated that the expectation of water service is a constitutionally-protected property interest. *See id.* Inasmuch as the plaintiffs were property owners and actual water service customers, no analysis was needed. It was clear that they had a property interest in the water service. This case does not, however, support plaintiff's claim that mere users of water service have a constitutionally-protected property interest in continued water service.

Plaintiff relies on two other cases, which the court will briefly address. First, plaintiff cites *Lake v. City of Youngstown*, No. 4:93CV2559 (N.D. Ohio Jul. 14, 1994), an unreported decision from the Northern District of Ohio. *Lake* is inapposite because the plaintiffs therein actually contacted the water department and applied for water service, whereas here, plaintiff made no effort to contact the water department until the water service had been terminated. In addition, the court in *Lake* did not undertake any analysis of whether the plaintiffs had a property interest in the water service, but instead quoted from *Mansfield Apartment Owners Ass'n* and summarily concluded that the plaintiffs had a property interest. This conclusion, without more, is unpersuasive.

Second, plaintiff relies on a statement from the Fifth Circuit in *Davis* that "due process demands pre-termination notice to the actual user." *Davis*, 497 F.2d at 143. As a complete reading of the passage quoted by plaintiff illustrates, there was no procedural due process claim before the appellate court. The *Davis* court's blanket statement, without any analysis, that due process requires pre-termination notice to the actual user is not persuasive. Further, as discussed *infra*, the Fifth Circuit, in a subsequent opinion, specifically addressed the issue currently before this court and ruled that a mere water user has no property interest in water service.

There is a line of cases in which courts have employed the same property-interest analysis used by this court and concluded that individuals, such as plaintiff, who have no contractual relationship with the public utility and where there exist no statute or ordinance providing free utility service for all residents of the city, do not have a property interest in the utility service and therefore are not entitled to any procedural due process. In *Sterling v. Village of Maywood*, 579 F.2d 1350 (7th Cir. 1978), the plaintiff was a rental tenant whose landlord contacted the municipality's water department and requested that the water service to plaintiff's building be terminated. The following day, a water department meter reader went to plaintiff's residence and suggested that she go

to the Village Hall and place the water service in her name. The next day, plaintiff received a water bill at her residence addressed to "occupant" which stated the amount due for past water service and indicated that the due date was approximately two weeks away. The bill also contained a note suggesting that the occupant place the account in her name to avoid termination of service. Two days later, without notice, plaintiff's water service was terminated. Plaintiff brought suit against the municipality, claiming, *inter alia*, that it violated her due process rights when it terminated her water service without prior notice and an opportunity for a hearing.

The Seventh Circuit held that plaintiff had no property interest in the continued water service and therefore failed to state a procedural due process claim. Specifically, the court held that a tenant water user, who had no contractual relationship with the municipality and where there was no statute that provided her with an entitlement to water service, "ha[d] no basis upon which to claim that there ha[d] been a deprivation of any property within the meaning of the Fourteenth Amendment." *Sterling*, 579 F. 2d at 1353 n.7.

The *Sterling* court distinguished other cases, including the Supreme Court's decision in *Craft*, on the grounds that those cases dealt with the right of a utility *customer*, the person paying the bill, as opposed to the rights of a mere utility user. *See id.* The court also found unpersuasive a cased relied upon by plaintiff herein, *Koger v. Guarino*, 412 F. Supp. 1375 (E.D. Pa. 1976), in which the district court stated that a water user has a legitimate claim of entitlement to continued service. The *Sterling* court correctly pointed out that the *Koger* court "merely stated that an interest existed without explaining the basis for the entitlement." *Sterling*, 579 F.2d at 1354. This court likewise finds the *Koger* decision to be unpersuasive.

The Fifth Circuit held that a rental tenant who had received water service for four years without payment had no legitimate claim of entitlement to continued water service. *See Coghlan*, 845 F.2d 566. The court found that plaintiff

had no contractual relationship with the waterworks district and that there was no statute that established a general right to water service. *See id.* at 569-70. Without either basis to support her claim of a property right, the court concluded that "mere receipt of the water for several years could not unilaterally create a legitimate claim of entitlement." *Id.* at 570.

Likewise, the First Circuit held that condominium residents who had received water service for four years without payment, but who did not have a contractual relationship with the water department and where there was no statute providing a general right to water service, had no property interest in continued water service. *See Marrero-Garcia*, 33 F.3d at 121-24.

The reasoning and holdings of these three cases demonstrate that plaintiff in the case at bar did not have any property interest in the continued water service to her residence. As discussed *supra*, she had no contractual relationship with the Division of Water and there is no provision of the Code purporting to provide general water service to the public at large without payment. Instead, plaintiff merely received water service at her apartment for two months. Her subjective expectation of continued water service does not give rise to a legitimate claim of entitlement to same. *See Marrero-Garcia*, 33 F.3d at 121-24; *Coghlan*, 845 F.2d at 569-70; *Sterling*, 579 F.2d at 1353 n.7; *see also Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 761 n.14 ("We do not believe that there is a property right to be furnished utility service without payment"); *Hendrickson v. Philadelphia Gas Works*, 672 F. Supp. 823 (E.D. Pa. 1987) (holding that non-customers and unauthorized users of a public utility had no constitutionally-protected property interest in the continuation of utility service).

Finally, in the course of her pleadings, plaintiff refers to water as a "basic necessity of life" and intimates that this renders it a constitutionally-protected property interest. That water is a basic necessity of life is irrelevant to the question of

whether water service is a property interest under the Fourteenth Amendment. *See Sterling*, 579 F.2d at 1354-55 (noting that the analysis of the importance of water as an absolute necessity of life "is irrelevant to the question of whether there is an entitlement"); *Jackson*, 483 F.2d at 761.

Plaintiff did not have a constitutionally-protected property interest in the water service that was being delivered to her residence. Accordingly, she was entitled to no procedural due process before that water service could be terminated. Defendants are entitled to summary judgment on plaintiff's procedural due process claim.

III. Conclusion

Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. The following claims and defendants are DISMISSED: (1) the Division of Water; (2) Doutt in his personal capacity; (3) the equal protection claim; and (4) the common law duty to serve claim. Defendants' motion to dismiss is DENIED as to plaintiff's ECOA claim. Defendants' motion for summary judgment is GRANTED, and plaintiff's procedural due process claim is DISMISSED.

It is so ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
UNITED STATES DISTRICT JUDGE

Date: June 20, 2002

UNITED STATES CONSTITUTION

Section 1 of the Fourteenth Amendment provides, in relevant part, "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

COLUMBUS CITY CODE

1101.03 Termination of water service.

(a) After twenty-one (21) days' notice, except as provided in Section 1101.04, the director may terminate water services to any person or real estate using city water in violation of this chapter for any of the following conditions.

(1) Nonpayment of accounts pursuant to City Code Section 1105.12;

(2) Violation of any rule and regulation promulgated pursuant to City Code Section 1101.01;

(3) Violation of City Code Section 1105.038;

(4) Violation of City Code Chapter 1113.

(b) The notice shall indicate the basis upon which service is being terminated and date after which service will be terminated if the violations are not corrected, or applicable payment or payment agreements are not received by the division of water pursuant to City Code Section 1105.12. The notice shall also indicate the hearing rights afforded to any person affected by the termination notice by which the person may contest the water service termination. The notice shall be mailed or hand delivered to the address of the customer of record and to the service address.

(c) Any affected person desiring a hearing concerning a termination of water service under this section or billing dispute under City Code Section 1105.12(E) must request a hearing with the director by submitting a written and signed request to the division of water no later than ten (10) days after receipt of a termination notice, or ten (10) days after the due date of the bill in question, whichever date is later. Failure of an affected person to file a request for hearing within the allotted ten (10) day period shall constitute a waiver by that person of their right to a hearing under this section. A request for hearing shall include as a minimum: name, address and telephone number of affected person; date; a statement requesting a hearing; and a description of the nature of the dispute, including the location of the affected property. The director or his designee shall convene a hearing on the matter within ten (10) days of receiving the request for hearing. If a hearing cannot be scheduled within this ten (10) day period, then the water service termination shall be automatically stayed, pending the holding of a hearing on this matter. The director shall adopt regulations establishing procedures by which hearings will be conducted pursuant to this section. For the purposes of this section the meaning of "affected person" shall include, but is not limited to, an owner, occupant, resident or tenant of the affected property. (Ord. 3251-98 § 1.)

(d) This section is not applicable to emergency termination of water services pursuant to City Code Section 1101.06, water service termination for the purpose of enforcing the termination of sewer services pursuant to City Code Section 1145.83, voluntary termination of water services pursuant to City Code Section 1101.07, or disruption of water service due to routine or scheduled maintenance of the water system or emergency circumstances. (Ord. 2805-91.)

1105.045 Unpaid charges a lien--Owner liable.

A. Each water charge charged under or pursuant to Chapter 1105, Columbus City Codes, is made a lien upon the corresponding lot, parcel of land, building or premises served by a connection to the water system of the city, and if the same is not paid within sixty (60) days after it becomes due and payable, it shall be certified to the auditor of Franklin County, Ohio, who shall place the certified amount on the real property tax list and duplicate of the property served by the connection. A penalty charge of ten (10) percent on the amount that is due and payable shall be added to the certified amount, plus an administrative charge for handling as specified in Section 1105.09. The total certified amount shall be collected as other taxes are collected. The city shall provide the owner of property with written notice of the impending certification at least thirty (30) days prior to the certification. For any procedure not specified in this section, refer to Section 743.04 of the Ohio Revised Code.

B. The division may also collect unpaid water charges by actions at law, in the name of the city, from an owner, tenant, or other person who is liable to pay the charges.

C. The owners of real estate premises installing or maintaining water service shall be liable for all water charges incurred for service at said premises.

D. The division will directly bill a tenant for water and sewer service if the property owner, or authorized agent of the property owner, along with the tenant, sign a written agreement authorizing direct billing of the tenant. Once a written agreement is signed, the division will simultaneously mail, to both the owner and the tenant, copies of any bills and notices concerning delinquent water and sewer charges. This requirement shall affect contracts made on or after the effective date of this paragraph.

E. Direct billing of a tenant shall be in no way construed as to relieve the owner of the real estate premises of liability for water and sewer service charges. No direct billing of a tenant will be allowed where all delinquent water and sewer charges are not paid in full up until the date the direct billing agreement is accepted by the city, or where water or sewer service has been terminated for real estate premises.

F. The owner of real estate premises by installing or maintaining water service from the city is deemed to assent to all rules and regulations of the division of water and ordinance of the city pertaining to water service and distribution. (Ord. 2804-91.)

1105.12 Billing, meter reading--Terms of payment.

A. Billing. The city may render bills for water service on either a monthly or quarterly basis. (Ord. 35-85.)

B. Bill Calculations. All meter readings and billings may be in units of one hundred (100) or one thousand (1,000) cubic feet, cubic meters or gallons and there shall be no proration of rates, except rates which may be prorated at the time of a rate change. Monthly periods described in Sections 1105.04, 1105.05, 1105.055 and 1147.11 are based on a thirty (30) day period. The amount billed shall be established by dividing the applicable rate by thirty (30) days to derive a daily rate and multiplying the daily rate by the number of days in the billing period. (Ord. 459-94.)

C. Terms of Payment. The water rates prescribed in City Code Sections 1105.04, 1105.05, 1105.09 and 1105.10 are net.

If bills are not paid within twenty-eight (28) days from the date of billing a gross rate, which is the net rate plus ten (10) percent, shall apply. (Ord. 35-85; Ord. 3252-98 § 1 (part); Ord 1448-02 § 1.)

D. Termination for Nonpayment of Accounts. Water service may be terminated for nonpayment of any and all charges now and hereafter in force, whether charged by the city of Columbus division of water, city of Columbus division of sewerage and drainage, or any of the division's contracting political subdivisions. Termination of water service for nonpayment of account shall be pursuant to the provisions of City Code Section 1101.03.

Water service will not be resumed until all service charges due and payable have been collected or a suitable payment

agreement has been received from the customer of record or the owner of the real estate.

The customer of record and the owner of the real estate shall be responsible for payment of all applicable service charges as defined in City Code Chapter 1105.

E. Billing Disputes. Customers of record and owners of the real estate wishing to contest any service charges for which they have been billed shall contact the division of water at the phone number and/or address provided on the bill, to discuss the matter with a division customer service representative. If the billing dispute is not resolved through discussion with division customer service representatives, the customer of record or owner of the real estate may file a request for a hearing on the matter with the director, pursuant to provisions set forth in City Code Section 1101.03(C). (Ord. 2805-91.)

4509.99 Penalties.

(A) Whoever violates any provision of this Housing Code is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars ($500.00) or imprisoned for not more than sixty (60) days or both. Each day that any such person continues to violate any of the provisions of this Housing Code shall constitute a separate and complete offense. Receipt of notice under C.C. 4509.02 shall not be a prerequisite for prosecution for any violation of this Housing Code, providing a diligent effort was made under its provisions.

(B) Whoever violates any provision of any rules or regulation adopted by the administrator pursuant to authority granted by this Housing Code is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars ($500.00) or imprisoned for not more than sixty (60) days or both. Each day that any such person continues to violate any rule or regulation adopted by the administrator pursuant to authority granted by this Housing Code shall constitute a separate and complete offense.

(C) Regardless of the penalty otherwise provided in this section, an organization convicted of a violation of the Columbus Housing Code, a misdemeanor of the third degree, shall be fined not more than three thousand dollars ($3,000.00). (Ord. 1057-94; Ord. 1272-01 § 1 (part).)

4521.01 Kitchen sink.

In every dwelling unit there shall be a kitchen sink in good working condition, properly connected to a public water and sewer system or to a water and sewer system approved by the health commissioner, and which is capable of providing at all times a reasonable amount of heated and unheated running water. (Ord. 1254-75.)

4521.02 Bathroom.

Every dwelling unit, except as otherwise permitted under Section 4521.03, shall have a bathroom which affords privacy to a person within the room. The facilities of the bathroom shall include one (1) flush water closet, lavatory basin, and bathtub or shower in good working condition and properly connected to a public water and sewer system or to a water and sewer system approved by the health commissioner which provides at all times an adequate amount of heated and unheated running water. All bathroom doors shall provide an unobstructed opening adequate for safety. (Ord. 356-75.)

No. 05-354

In The

Supreme Court of the United States

CITY OF COLUMBUS, et al.,

Petitioners,

v.

HAZEL GOLDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

BENSON A. WOLMAN
Counsel of Record
KIMBERLY M. SKAGGS
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1509
Columbus, Ohio 43215
Telephone: (614) 221-9800
Facsimile: (614) 221-9810

Attorneys for Hazel Golden

QUESTION PRESENTED

Whether a municipality's termination of water service to a current tenant and its refusal to permit that tenant to contract for water service, because of the failure of the prior tenant or the landlord to pay an outstanding water bill, violate the Fourteenth Amendment rights of the current tenant who did not incur the arrearage.[1]

[1] Petitioners frame the question, "Whether the government's termination of water service to a rental property based on the landlord's failure to pay the unit's outstanding utility bill violates the equal protection rights of a current tenant who did not incur the arrearage."

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STATEMENT

Respondent Hazel Golden is a former tenant of a rental house in Columbus, Ohio. Unknown to Ms. Golden, at the time she moved into the house, there was an outstanding balance on the water bill for the premises incurred by a prior tenant which neither the prior tenant nor the landlord had paid. According to the City of Columbus City Code, "owners of real estate premises installing or maintaining water service shall be liable for all water charges incurred for service at said premises." City of Columbus Code 1105.045(C). When the landlord failed to abide by City Code and pay the bill, the City terminated water service to the house without providing Ms. Golden with notice or an opportunity to be heard. Service was resumed on several occasions at the request of the City's code enforcement department, but turned off again when the landlord continued to fail to pay the outstanding water bill.

During this time, Ms. Golden attempted to obtain water service in her name. As a tenant, the only method by which Ms. Golden could open an account in her name was under a "direct billing agreement."[2] Ms. Golden submitted a "direct billing agreement" but received no response. In any event, because there was a pending arrearage by the former tenant, Ms. Golden did not qualify for a direct billing arrangement under the code. *See* City of Columbus Code 1105.045(E). Ultimately, she vacated the premises.

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[2] The City permitted tenants to have accounts in their names in limited circumstances if the landlord agreed to such an arrangement via a direct billing agreement. *See* City of Columbus Code 1105.045(E).

On July 25, 2001, Ms. Golden filed suit in the Southern District of Ohio, alleging among other things that petitioners violated her right to equal protection and due process of law by terminating water service to her rental unit based on a debt for which she was not responsible without notice and an opportunity to be heard, and by refusing to allow her to establish water service in her name. On June 6, 2002, the district court dismissed her equal protection and due process claims.

With respect to equal protection, the district court rejected Ms. Golden's assertion that water is a fundamental right requiring the City to have a compelling reason for treating landowners and non-landowners differently. Instead, the district court applied rational basis review finding that the City's policy affected only economic interests rather than fundamental constitutional rights. The district court then held that the City's policy was a rational means of ensuring payment of water bills.

With respect to due process, the district court found that tenants do not have a protected property interest in the right to water service for purposes of due process and, as such, dismissed Ms. Golden's due process claim.

On appeal, the Sixth Circuit reversed the district court's dismissal of Ms. Golden's equal protection claim but upheld the dismissal of her due process claim. With respect to equal protection, the court of appeals agreed with the district court that rational basis scrutiny applied to Ms. Golden's claims; however, it disagreed with the district court's determination that the City's policy was rational. Instead, the court concluded that the City's policy "divides tenants in an irrational manner because it denies water service only to those tenants whose predecessors or

landlords failed to pay the water bills."[2] The court explained that this conclusion was compelled by its prior decision in *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684 (CA6 1976), *aff'd*, 436 U.S. 1 (1978), which in turn adopted the reasoning of the Fifth Circuit's decision in *Davis v. Weir*, 497 F.2d 139 (1974). The court in *Davis* held unconstitutional a similar policy, reasoning that "[t]he City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence – water." *Id.* at 145. Because the court in *Davis* construed such policies as an illegitimate attempt to extract payment from the new tenant, it held that scheme was "devoid of logical relation to the collection of unpaid water bills from the defaulting debtor." *Id.* at 144-45.

With respect to due process, the court noted that Ms. Golden failed to cite to Ohio's Landlord Tenant Act as a potential source of property rights for purposes of due process. The court noted that, "other circuits have held that certain provisions common to landlord-tenant statutes to be sufficient for this purpose," citing the Eleventh Circuit cases of *James v. City of St. Petersburg*, 33 F.3d 1304, 1306-07 (CA11 1994) (*en banc*); *DiMassimo v. Clearwater*, 805 F.2d 1536, 1539-40 (CA11 1986), and the Ninth Circuit case of *Turpen v. City of Corvallis*, 26 F.3d 978, 979 (CA9), *cert. denied*, 513 U.S. 963 (1994). The court did not

[2] The Sixth Circuit understood that the classification for purposes of equal protection was between two classes of tenants as opposed to the district court's conclusion that the classification was between landowners and tenants.

express an opinion as to whether these precedents would have weighed in Ms. Golden's favor and determined that Ms. Golden did not demonstrate that she had a cognizable property interest in continued water service.[4] The Sixth Circuit therefore affirmed the district court's dismissal of Ms. Golden's due process claim, which is not an issue in the current Petition.[5]

This timely Petition for Writ of Certiorari was filed September 15, 2005.

SUMMARY OF THE ARGUMENT

First, the circuit courts are not "deeply divided" over whether the Equal Protection Clause permits a city to terminate utility service to a rental property when the current tenant is not responsible for the debt. The only case cited by petitioners to make an equal protection decision contrary to the one in *Golden* is a 1988 Third Circuit decision. *See Ransom v. Marrazzo*, 848 F.2d 398, 414 (CA3 1988). More important, that case may not truly represent a split of authority because it can be factually distinguishable as the *Ransom* plaintiffs were "non-tenants."

[4] Since the time of the Sixth Circuit's decision in *Golden*, that court has had an opportunity to determine the question of whether Ohio's Landlord Tenant Act creates in a tenant a property interest to continued water service. *See Midkiff v. Adams Cty. Regional Water Dist.*, 409 F.3d 758 (CA6 2005), *reh'g and reh'g en banc denied*, 2005 U.S. App. LEXIS 19254 (CA6 Aug. 30, 2005). The court answered that question in the negative.

[5] The court of appeals also upheld the district court's dismissal of respondent's Equal Credit Opportunity Act claims and its denial of class certification.

The case cited by petitioners that allegedly demonstrates a conflict between *Golden* and the state courts of Ohio is also off the mark. *See Morrical v. Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984). That case is not from Ohio's highest court and, in any event, deals with the issue of whether a landlord can be held responsible for the debts of a tenant, which, as stated, *infra*, is not the issue before this Court.

Second, petitioners confuse the issue to overstate and misstate the effect of the *Golden* decision on "the financial stability of tens of thousands of municipal utilities." Pet. Br. 10. Petitioners' argument suggests that the *Golden* decision affects a municipality's ability to hold a property owner responsible for a delinquent tenant's bill. That is not true, as many municipal utilities in Ohio and elsewhere address the concern of delinquent tenants by holding a landlord ultimately responsible for payment. This practice has been held to be rational and legal. *See Mansfield Apt. Owners Assoc. v. City of Mansfield*, 988 F.2d 1469, 1478 (CA6 1993). *Golden* does not affect that practice but instead deals with the very different question of the constitutional rights of tenants who are denied water service.

Next, the *Golden* decision is not a "substantial departure" from this Court's equal protection precedents. The *Golden* court used rational basis scrutiny, the least deferential level of scrutiny, which is hardly a substantial departure from this Court's long line of equal protection precedent.

Finally, the present case is not the proper vehicle for resolution of any of the issues raised by petitioners. Petitioners present an equal protection argument only; however, the issues raised by the denial of utility service

to tenants involve both the Equal Protection Clause *and* the Due Process Clause. It would be confusing and a waste of judicial resources for this Court to decide only the equal protection issue.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Are Not "Deeply Divided" Over Whether The Equal Protection Clause Permits A Municipality to Terminate Utility Service To A Rental Property When The Current Tenant Is Not Responsible For The Debt.

A. This issue does not necessarily present a true question of law warranting review by this Court.

Petitioners refer to a recurring conflict among the federal courts of appeals; however, this "conflict" may hinge on factual distinctions rather than a true question of law signifying a split among the circuits. The only case cited by petitioners to hold contrary to the equal protection holding in *Golden* was decided by the Third Circuit over seventeen years ago. *See Ransom v. Marrazzo*, 848 F.2d 393, 412-13 (CA3 1988). That case may not present a true split in the law of equal protection because it's factually distinguishable from *Golden* and its predecessors.[6] The plaintiffs in *Ransom* cannot be compared to those in *Golden* or its predecessors because the plaintiffs in *Ransom* were "non-tenants." *Id.* at 401. The *Ransom* court

[6] *Davis v. Weir*, 497 F.2d 139 (CA5 1974); *Sterling v. Village of Maywood*, 579 F.2d 1350 (CA7 1978), *cert. denied*, 440 U.S. 913 (1979); *O'Neal v. City of Seattle*, 66 F.3d 1064 (CA9 1995).

specifically noted this fact stating, "Thus, *we do not reach* the question of whether the asymmetries in the landlord-tenant relationship introduce an added constitutional dimension to the propriety of denying service to *non-delinquent tenants*." *Id.* at 402 n.1 (emphasis added).[7] As such, *Ransom* acknowledges that it does not address the issue presented by *Golden* and may indicate that there is *not* a split of authority that is ripe for this Court's consideration.[8]

Another good example of factual distinction that can obscure the legal issues raised by petitioners is illustrated by the Sixth Circuit's decision in *Midkiff v. Adams Cty. Regional Water Dist.*, 409 F.3d 758 (CA6 2005), *reh'g and reh'g en banc denied*, 2005 U.S. App. LEXIS 19254 (CA6 Aug. 30, 2005).[9] The Sixth Circuit decided *Midkiff* shortly after it decided *Golden*, but found there was no equal protection violation in *Midkiff*, despite the fact that *Midkiff* involved a municipality's shut-off of a tenant's water service based on the debts of past tenants. The Sixth Circuit found that unlike in *Golden*, in which the court

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[7] The Ninth Circuit recognized this distinction, but nonetheless chose to distinguish *Ransom* on its merits. *See O'Neal v. City of Seattle*, 66 F.3d 1064, 1068 n.3 (CA9 1995). ("Although the *Ransom* court may have intended to limit the scope of its opinion, its substantive discussion of the landlord-tenant cases is, at a minimum, instructive. We therefore discuss its analysis without attempting to distinguish the case on landlord-tenant grounds.")

[8] Petitions for Writs of Certiorari have been denied in similar cases twice. *See Turpen v. City of Corvallis*, 26 F.3d 978, 979 (CA9), *cert. denied*, 513 U.S. 963 (1994); *Sterling v. Village of Maywood*, 579 F.2d 1350 (CA7 1978), *cert. denied*, 440 U.S. 913 (1979).

[9] *See also DiMassimo v. City of Clearwater*, 805 F.2d 1536, 1541 (CA11 1986) (finding no equal protection violation because the classification in that case was between landlords and tenants rather than two different classifications of tenants).

compared different classifications of tenants for purposes of equal protection, the only classification set forth in *Midkiff* was between landlords and tenants, two groups that are not similarly situated for equal protection purposes. The Sixth Circuit narrowly construed *Golden*; it distinguished *Golden* not by a different interpretation of equal protection law, but by different factual circumstances in the case.

B. Petitioners' allegation that the *Golden* case is in conflict with Ohio state law is wrong.

Petitioners further argue that the *Golden* decision conflicts with the law of Ohio, citing to *Morrical v. Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984). Again, Petitioners confuse the issues presented by *Golden*. The *Morrical* case holds:

> A municipal ordinance which imposes liability on a property owner for water services provided to a tenant on the premises does not violate either the Due Process or Equal Protection Clauses of either the state or federal Constitutions.

Id. at syllabus ¶ 1. The holding of that case therefore deals with the liability of property owners, which is not at issue in the *Golden* decision.[10] No matter what the outcome of *Golden*, municipalities always have the right to collect utility debts from the owner of the property on which the debt was incurred. *See, e.g., Mansfield Apt. Owners Assoc. v. City of Mansfield*, 988 F.2d 1469, 1478 (CA6 1993).

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[10] *See* further discussion in Section II.

II. Petitioners Wrongly Allege That The *Golden* Decision Prevents Landlords From Being Held Responsible For Tenants' Bills.

The purportedly great economic effect of this decision alleged by petitioners comes from petitioners' misstated argument regarding the effect of the *Golden* decision. Petitioners go on at length about the importance of holding landowners ultimately responsible for the debts of their tenants. However, the *Golden* decision has no effect on this practice.

Petitioners contend that the *Golden* decision[11] "prohibits a municipality from making landlords responsible for the payment of utility bills for their rental properties and terminating service to the property if the bill is not paid and the tenant living in the unit at the time of termination is not responsible for the arrearage." Pet. Br. 5.

Petitioners' argument and language suggest to this Court that these decisions prohibit a municipality from holding landlords responsible for payment of utility bills for their rental properties. This is simply not true. It is well established that a municipality does not violate the constitution by holding a landlord liable for utility debts incurred on his or her property. *See Mansfield Apt. Owners Assoc.*, 988 F.2d at 1478. Instead, the effect of *Golden* and its predecessors is to prohibit one means of *enforcement* of a municipality's right to collect from a landlord when that

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[11] As well as the decisions in *Davis v. Weir*, 497 F.2d 139 (CA5 1974); *Sterling v. Village of Maywood*, 579 F.2d 1350 (CA7 1978), *cert. denied*, 440 U.S. 913 (1979); and *O'Neal v. City of Seattle*, 66 F.3d 1064 (CA9 1995).

enforcement violates the constitutional rights of an innocent, subsequent tenant.

Petitioners attempt to commingle and confuse these two separate issues in an effort to make unconstitutional policies appear "rational." Again and again in their argument, petitioners refer to the right to "hold landlords responsible for utility bills on their rental properties and to terminate service for nonpayment." *That is not the issue presented.* The issue is whether a municipality can deny water service to tenants and terminate water service to a tenant based on the bill of a third party, because the municipality wants a method of enforcement to strong arm landlords into paying bills for delinquent tenants who have since moved off the property. *Regardless of the answer to that question, the municipality always has the right to hold the landlord responsible for the debt.*

In sum, petitioners' argument regarding the great economic effect of the *Golden* decision is exaggerated and overstated. Municipalities will continue to have the right to hold landlords responsible for utility debts incurred on their property regardless of the *Golden* decision.

III. The *Golden* Court Used Rational Basis Review – The Least Deferential Level Of Scrutiny – In Its Equal Protection Analysis And, Therefore, Did Not Substantially Depart From This Court's Precedent.

Petitioners claim that the decision in *Golden* is a substantial departure from "the deferential standard of review required for ordinary economic legislation." It is somewhat puzzling that petitioners raise the issue of the standard of review used for equal protection review or

suggest there is a conflict about that standard when there has never been an argument nor a difference among the courts regarding that issue. Respondent conceded to the Sixth Circuit that rational basis review was the appropriate standard, and that court applied rational basis review, the least deferential standard.

The *Golden* court found, as did the Ninth Circuit in *O'Neal*, "pursuing payment from the prior tenant and the landlord would be rationally related to the City's goal; refusing service to an unobligated new tenant would not." *Golden*, 404 F.3d at 962 (*quoting O'Neal*, 66 F.3d at 1068). The *Golden* court got it right. Petitioners' argument to the contrary is again based on their flawed premise that the only way to hold the landlord responsible for the debts of tenants – their economic rationality argument – is to withhold service from landlords for nonpayment, no matter what the consequences are to innocent subsequent tenants. The *Golden* court carefully analyzed the situation using the proper standard of review. This is hardly a substantial departure from precedent warranting oversight from this Court.

IV. The Present Case Is Not The Proper Vehicle For Resolution Of Any Of The Issues Raised By Petitioners.

A. This case fails to raise due process issues, a critical part of the analysis in every case that has addressed this issue.

This case is not the proper vehicle for resolution for any of the issues raised by petitioners. In the present case,

petitioners do not raise a due process argument because the *Golden* court agreed with their position on due process.[12] However, every single case cited by petitioners that has considered the equal protection argument has also considered the corresponding due process issue. If this Court is going to resolve the Fourteenth Amendment questions resulting from this issue, it should consider the issue fully and determine both the due process and equal protection arguments in a case that presents both arguments. It would be a waste of judicial resources for this Court to resolve only a portion of this issue.

B. This case fails to raise a fundamental question: whether tenants have a protected property right to continued water service.

For purposes of due process, a fundamental issue that is raised by the case law in this area – but not at issue in the Petition – is whether tenants have a protected property interest in continued water service. This is a fundamental question that should be answered by this Court in any analysis of the rights of tenants with respect to water service.

Several circuit courts have found a source of such a property interest to exist in state landlord-tenant statutes. *See, e.g., James v. City of St. Petersburg*, 33 F.3d 1304, 1306-07 (CA11 1994) (*en banc*); *DiMassimo v. Clearwater*, 805 F.2d 1536, 1539-40 (CA11 1986); *Turpen v. City of Corvallis*, 26 F.3d 978, 979 (CA9), *cert. denied*, 513 U.S. 963 (1994). Unfortunately, the issue of the Ohio landlord-tenant

[12] Respondent chose not to cross petition because she failed to raise Ohio's Landlord-Tenant statutes in the lower court, as more fully explained in Sec. IV, Part B.

statutes was not raised in the *Golden* case, as noted by the Sixth Circuit, "[w]e express no opinion as to whether these precedents weigh in Golden's favor because Golden does not rely upon any provision of Ohio's landlord-tenant law in this appeal." *Golden*, 404 F.3d at 958. However, after *Golden*, the Sixth Circuit found that Ohio's landlord-tenant statutes do not confer a property interest to tenants in continued water service. *See Midkiff v. Adams Cty. Regional Water Dist.*, 409 F.3d 758, 765 (CA6 2005), *reh'g and reh'g en banc denied*, 2005 U.S. App. LEXIS 19254 (CA6 Aug. 30, 2005). If there is any disagreement among the circuits, it is regarding that question which cannot be resolved by the *Golden* case.

Accordingly, state landlord-tenant statutes are not at issue in *Golden* and, therefore, *Golden* is not the proper case for this Court to resolve the due process issues nor the greater Fourteenth Amendment issues.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BENSON A. WOLMAN
Counsel of Record
KIMBERLY M. SKAGGS
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1509
Columbus, Ohio 43215
Telephone: (614) 221-9800
Facsimile: (614) 221-9810

Attorneys for Hazel Golden

No. 05-354

In the Supreme Court of the United States

CITY OF COLUMBUS, ET AL., PETITIONERS

v.

HAZEL GOLDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Andrew Jay Burkholder
Acting Law Director

Attorney for Amicus Curiae The City of Springfield

Julia L. McNeil
City Solicitor

Attorney for Amicus Curiae The City of Cincinnati

Max Rothal
Director of Law

Attorney for Amicus Curiae The City of Akron

Barry M. Byron
Counsel of Record
John E. Gotherman
Interstate Sq. Building I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Attorneys for Amicus Curiae The Ohio Municipal League

CURRY & TAYLOR • WASH D.C. • (202) 223-2160 • USSCINFO.COM

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INTERESTS OF *AMICI CURIAE*[1]

Springfield

The City of Springfield, Ohio ("Springfield") operates a municipal water utility providing services to customers within its corporate boundaries and beyond. Springfield's municipal water utility ordinances require the City Manager to charge, assess and collect charges for water services from property owners. Those ordinances do not provide for charging, assessing or collecting charges for water services from tenants. The Springfield municipal water utility ordinances also authorize the termination of water services if the water bill is not paid. Resumption of water service is conditioned upon the payment of all charges and fees due. Termination of water services for non-payment of water bills has been an effective method to enforce the collection of revenue to which Springfield is entitled for services rendered. As a practical matter, Springfield's policy for billing and collecting water utility charges related to residential rental properties is equivalent to that of the City of Columbus.

The 6th Circuit Court of Appeals decision in *Golden v. City of Columbus* will effectively prevent the use of this collection method when property owners succeed in renting units to new tenants before past due water bills are paid. The consequence will be elevated costs to the municipal utility in the form of increased uncollected receivables and the increased costs and personnel time associated with collection litigation

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[1]No person, other than *amici* and their counsel, participated in the writing of this brief or made any financial contribution to the brief.

against delinquent property owners – all to the prejudice of utility rate payers. Further, the additional collection litigation against delinquent property owners will add a significant burden to the local courts - to the prejudice of the community as a whole.

Cincinnati

The City of Cincinnati, Ohio ("Cincinnati") operates a municipal water utility providing services to customers within its corporate boundaries and beyond. Cincinnati's municipal water utility ordinances require the Director of the water utility to charge, assess and collect charges for water services from property owners. Those ordinances do not provide for charging, assessing or collecting charges for water services from tenants.

The Cincinnati municipal water utility ordinances also authorize the termination of water services if the water bill is not paid. Resumption of water service is conditioned upon the payment of all past due charges or such other payment arrangements as may be agreed upon by the utility and the property owner. Payment arrangements are not made directly with a non-owner.

As a practical business process, and courtesy to property owners, Cincinnati will send a duplicate copy of the billing statement to a third party and accept payment from same. The Ohio Revised Code provides for rent escrows to assist tenants whose landlords are not fulfilling the terms of lease agreements or maintaining properties according to certain standards. Additionally, the Cincinnati Municipal Code of Ordinances (ref. Section 401-93-A(e)) provides for tenants to make payment on past due balances to

prevent disconnection of services, or to effect reconnection of services, on behalf of the property owner, and to deduct such payments from rents owed the property owner without the need to set up escrow.

Termination of water services for non-payment of water bills has been an effective method to enforce the collection of revenue to which the Cincinnati is entitled for services rendered.

As a practical matter, Cincinnati's policy for billing and collecting water utility charges related to residential rental properties is similar to that of the City of Columbus. One clear exception is that Cincinnati maintains no direct tenant relationship, requiring the property owner's name on all accounts. Tenant occupied properties are served written notice at least 7 days prior to disconnection. The notice explains tenant rights and the Cincinnati Call Center maintains a referral list of agencies that will assist them.

Cincinnati joins Springfield in its assessment of the effect of the *Golden* case upon collection practices, increased costs of collection and the adverse impact on the local courts.

Akron

The City of Akron, Ohio ("Akron") operates a municipal water works utility providing services to customers within its corporate boundaries and beyond. Akron's Water Works Rules and Regulations require all contracts for water service be between Akron and property owners. The Rules and Regulations also authorize the termination of water services if the water bill is not paid.[2] Resumption of water service is

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[2] The practice of terminating water service to rental properties

conditioned upon the payment of all charges and fees due. Akron permits property owners to make payment arrangements on delinquent utilities billings.

Only property owners may enter into payment arrangements and contract for service. Payments may be accepted from third parties, including tenants and land contract buyers. However, the property owner is ultimately responsible for all billings. As a courtesy, billings will also be mailed to third parties if requested by a property owner. Land contract buyers are also permitted to act as agents for the property owners with the property owner's written consent and ultimate responsibility

Termination of water services for non-payment of water bills has been an effective method to enforce the collection of revenue to which Akron is entitled for services rendered. As a practical matter, Akron's policy for billing and collecting water utility charges related to rental properties is similar to that of the City of Columbus.

Akron joins Springfield and Cincinnati in their analysis of the effect of *Golden v. City of Columbus* on Akron's water service. The case will effectively prevent the use of a rational collection method when property owners succeed in renting units to new tenants before past due water bills are paid. The consequence will be elevated costs to the municipal utility in the form of increased uncollected receivables and the increased costs and personnel time associated with collection litigation against delinquent property owners – all to the prejudice of utility rate payers. Further, the additional collection litigation against delinquent property owners will add a significant

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has been suspended by Akron during the pendency of this case.

burden to the local courts – to the prejudice of the community as a whole.

The Ohio Municipal League

The Ohio Municipal League ("League") is an Ohio non-profit corporation whose membership includes over 750 cities and villages in the State of Ohio. When issues relating to an Ohio municipality's lawful authority are raised in litigation, the League frequently advocates for such authority as an *amicus* on behalf of the municipality.

The League seeks to amplify the positions of Cincinnati, Springfield and Akron: the Sixth Circuit Court of Appeals' decision is of state-wide importance in Ohio, and Ohio municipal utilities will suffer an adverse impact if the improper decision is permitted to remain the law of the Sixth Circuit.

Because of Article XVIII of Ohio's constitution, which grants broad home rule powers to municipalities, there are an indefinite number of methods by which Ohio municipalities may seek to ensure that municipal utility bills are paid. The League asserts that as long as any method of collection is undergirded by a rational basis, as the Columbus policy is, such method ought to be permitted under the Fourteenth Amendment to the United States Constitution.

INTRODUCTION: SUMMARY OF ARGUMENT

Cincinnati, Springfield, Akron and the League ("*Amici*") believe that the arguments of the City of Columbus in support of the petition are compelling. Those arguments will not be repeated at length herein. The *Amici* write in order to emphasize the importance of this case in Ohio, and to the *Amici* municipalities which run utility systems (see **Interests of *Amici Curiae***, above).

Since 1912, municipalities in Ohio have had the constitutional authority to acquire and operate public utilities. This indicates the importance the people of Ohio have placed on having reliable municipal utility services.

Numerous municipal utilities across Ohio, including those operated by the *Amici* municipalities, have policies which are similar to those of Columbus. These policies allow for the termination of water service to a property when a bill is delinquent. As a consequence of the Sixth Circuit's ruling, these municipal utilities have been denied an extremely effective tool for the prompt collection of delinquent water bills when a property owner succeeds in leasing a property before the delinquent bill is paid. This tool helps to ensure the efficient collection of revenues which are sufficient to pay for current operational expenses and debt service.

Additionally, persons who rent from landlords who have delinquent debt are not similarly situated, under Ohio property law, to those persons who rent from landlords who are not delinquent on their debt. Consequently, the policy of the City of Columbus does

not violate the Equal Protection Clause of the Fourteenth Amendment.

The *Amici* urge this honorable court to take this case and resolve the conflict which has developed between the Federal Circuit Courts of Appeal. Of particular significance to Ohio's municipalities: the Sixth Circuit's decision under the Fourteenth Amendment conflicts with an Ohio court's analysis of the Equal Protection issue, and this conflict should be resolved by this court.

ARGUMENT

Amici concur with the legal arguments made by the Petitioners and will not restate them, in full, here. S.Ct. Rule 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matters not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.")

Instead, *Amici* will explain why this case is of importance to Ohio municipalities. *Amici* will also, briefly, discuss why a tenant who moves into a property which is burdened by a delinquent debt is not similarly situated, as a matter of law, to the tenant who moves into a property which is not so burdened.

THE IMPORTANCE OF THIS CASE

The Ohio Constitution

On September 3, 1912, the people of the State of Ohio gave Ohio municipalities the constitutional right to operate public utilities. Article XVIII, Section 4 of the Ohio Constitution provides:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Rather than rely on the legislative authority of the state to grant the power to municipalities to operate public utilities, the people of Ohio determined that municipal public utilities were a matter of such importance that they warranted a place in the constitution. *Village of Lucas v. Lucas Local School District*, 2 Ohio St.3d 13, 442 N.E.2d 449 (1982).

The importance of municipal utility powers to the people of Ohio has not changed since 1912.

Collections

It is reasonable to assume that the people of Ohio, in providing constitutional authority to municipalities to construct, acquire and operate municipal utilities, wanted those utilities to function properly. They wanted the municipal utilities to deliver the municipal utility service, expand capacity as the service territory grew, and collect rates and fees which were sufficient to finance capital costs and pay current expenses.

In performing the functions expected of them by the people of Ohio, municipalities have found that a policy of making property owners responsible for utility charges is far more practical than merely holding tenants in possession of the property responsible. There are several obvious reasons for these policies. Tenants are, frequently, transient making collection problematic. *City of Canton v. Canton Realty & Dev.*, 1999 Ohio App. LEXIS 2791, at *11. Additionally, the landlord can adjust the rent to cover utility charges. *Id.* There is also the ability to place delinquent water charges on the tax list and duplicate, to be collected as a tax. Ohio Revised Code Section 743.04(A) This filing also serves as a lien on property to which the service has been rendered, ensuring that payment of the delinquent charges is made to the municipality at the time the property is transferred. *Id.*

The policy of holding the property owner responsible for the consumption of utility service by occupants of the served property has been repeatedly upheld by the Ohio courts. *Pfau v. City of Cincinnati*, 142 Ohio St. 101, 50 N.E.2d 172 (1943); *Morrical v. Village of New Miami*, 16 Ohio App. 3d 439, 476 N.E.2d 378 (1984); *City of Bucyrus v. Sears*, 34 Ohio App. 450,

171 N.E. 256 (1930). It has also been upheld by this court. *Dunbar v. New York*, 251 U.S. 516 (1920).

Instead of going to court to foreclose on a tax lien or obtain a judgment for the past-due water bills, many Ohio's municipalities have utilized a different tool. The disconnection of water service to a property which is delinquent in payment of its water bills has proven to be an expeditious alternative to litigation. Such a policy is permitted under Ohio law. *Pfau v. City of Cincinnati*, 142 Ohio St. 101, 50 N.E.2d 172 (1943).

The League assisted Columbus in conducting a volunteer-response poll of governmental water utilities and their collection practices. Of the 31 respondents from Ohio, 28 of the utilities held the property owner responsible for the water bill of tenants. 16 of the 31 respondents, including Springfield and Cincinnati, utilize termination of water services as a method of encouraging the payment of delinquent water bills. It is respectfully suggested that even the **possibility** that water service may be terminated is one of the most effective tools that a municipality has to collect delinquent accounts. The denial of the ability to use this tool will have an adverse effect on the collection rates of Ohio municipal water utilities, to the detriment of all of the ratepayers who pay their bills.

LEGAL ARGUMENTS

Rational Basis

All parties agree that the principal consequence of terminating water service to a rental property is to make that property less attractive as a residence. Consequently, the renter may be the unenviable position of having to vacate such a property or (if allowable under local ordinances) having to utilize water from other sources, even though he or she did not incur the debt for which services were terminated. While this may be inconvenient for the tenant, it is not unconstitutional. It is precisely the fact that the property becomes less economically viable to the delinquent landlord which makes the policy rational. The landlord has a strong economic incentive to pay the bill, or the economic benefit of the property will be lost; alternatively, the tenant could volunteer to pay the bill, then subsequently set off the payment from future rental payments. In either event, the municipality recovers the debt. The tool which is used, disconnection of utility services (even the threat of disconnection), is rationally related to the legitimate end of the municipality: collection of the debt.

Not Similarly Situated

The touchstone of the equal protection clause is that persons who are similarly situated should be treated equally. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

Those tenants who move into a property where there is a delinquent water bill (or other delinquent

debt) are, as a matter of Ohio property law, **not** similarly situated to those tenants who move into a property where there is no such debt. Theoretically, a lien could be filed for such delinquent water bill, under Ohio Revised Code (R.C.) §734.04(A) and a foreclosure action brought pursuant to R.C. §5721.10. For delinquent debts that are not on the tax list and duplicate, but have been reduced to judgment, execution against real property (foreclosure) is brought under R.C. Chapter 2329.

Foreclosure on property results in the dispossession of tenants because a tenant's right to possession is no greater than the title holder's rights. *New York Life Ins. Co. v. Simplex Products Corp.* (1939), 135 Ohio St. 501, 21 N.E.2d 585; *Hembree v. Mid-America Federal* (1989), 64 Ohio App. 3d 144, 580 N.E.2d 1103. Thus, under established property law in Ohio, a person who did not incur a debt could have a possessory interest in property extinguished by operation of law. Consequently, in Ohio, a person who leases property from another person who has delinquent debt is simply **not** similarly situated to a person who leases from another person whose debts are not delinquent.

The fact that the process of dispossession can be accelerated by the termination of utility services speaks to its efficacy: i.e. the rational basis for the municipal collection policy. The result (the dispossession of an innocent, third party tenant from rental property as a consequence of collecting a delinquent debt of the property owner) is identical to foreclosure.

The Sixth Circuit's decision in this case, predicated on its prior decision in *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (6th Cir.

1976), *aff'd on other grounds*, 436 U.S. 1, 56 L.Ed.2d 30, 98 S.Ct. 1554 (1978), wrongly concludes that persons who are dissimilarly situated under Ohio real property law are, in fact, similarly situated. This improper conclusion should be reversed by this court.

CONCLUSION

This honorable court is respectfully requested to accept jurisdiction over this case in order to settle the conflict between the circuits (and with Ohio case law) identified by the Petitioners, and to reverse the decision of the Sixth Circuit Court of Appeals. This case is of the utmost importance to Ohio municipalities and is worthy of this court's time and attention.

Respectfully submitted,

Andrew Jay Burkholder
Acting Law Director
City of Springfield
76 E. High Street
Springfield, Ohio 45502
(937) 324-7351

Attorney for Amicus Curiae
The City of Springfield

Barry M. Byron
Counsel of Record
John E. Gotherman
Interstate Square
Building I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Attorney for Amicus Curiae
The Ohio Municipal League

Julia L. McNeil
City Solicitor,
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

Attorney for Amicus Curiae
The City of Cincinnati

Max Rothal
Director of Law
161 S. High Street,
Ste. 202
Akron, Ohio 44308
(330) 375-2030

Attorney for Amicus Curiae
The City of Akron

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No. 05-354

IN THE

Supreme Court of the United States

City of Columbus et al.

Petitioners,

v.

Hazel Golden.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan E. Ashbrook
COLUMBUS CITY
ATTORNEY'S OFFICE
90 W. Broad Street
Suite 200 City Hall
Columbus, OH 43215

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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REPLY BRIEF FOR THE PETITIONER

This case presents a frequently recurring question of law of manifest importance to the nation's municipalities that the Sixth Circuit decided in direct conflict with this Court's precedents. The court of appeals held that a municipal policy that terminates utility service to a rental unit when the landlord does not pay the bill fails rational basis scrutiny whenever the rental unit is occupied by a tenant who did not incur the unpaid charges. That decision is clearly wrong, for terminating utilities in such circumstances is an entirely rational and effective means of enforcing a landlord's obligation to pay for services to his rental units. The court of appeals was able to reach a contrary conclusion only by applying a substantially higher degree of scrutiny than is permitted under this Court's precedents governing challenges to ordinary social and economic legislation. That holding – along with parallel holdings by the Fifth, Seventh, and Ninth Circuits – constitutes a massive invasion of the sovereign authority of states and municipalities around the nation. That invasion is, in itself, a sufficient basis for certiorari. But intervention by this Court is also needed to resolve the acknowledged and entrenched split between these courts and the Third Circuit, and between the state and federal courts within Ohio. Respondent fails to provide any convincing reason for this Court to delay any further the resolution of that conflict and the restoration of the proper constitutional balance between these local governments and the federal courts.[1]

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[1] The only petitions previously raising even related questions (see BIO 7 n.8) were either presented to this Court before the circuit conflict arose (*Sterling* v. *Vill. of Maywood*, 579 F.2d 1350 (CA7 1978), cert. denied, 440 U.S. 913 (1979)) or presented only a distinct procedural due process challenge that is not the subject of the conflict (*Turpen* v. *City of Corvallis*, 26 F.3d 978 (CA9 1994), cert. denied, 513 U.S. 963 (1994)).

1. Respondent and the court of appeals acknowledged that petitioner's water collection policy is subject to ordinary rational basis scrutiny. BIO 11; Pet. App. 16a. The petition for certiorari demonstrated that municipal policies such as petitioners' are not only rational, but entirely reasonable, placing responsibility for payment of utilities directly on the shoulders of a landlord and terminating services to rental properties as a means of enforcing that obligation. Pet. Br. 14-19.

Respondent asserts that this argument is "based on [the] flawed premise that the only way to hold the landlord responsible for the debts of tenants * * * is to withhold service from landlords for nonpayment, no matter what the consequences are to innocent subsequent tenants." BIO 11.[2] That defense of the Sixth Circuit's ruling is both wrong and telling. It is wrong because petitioners' premise is *not* that Columbus's collection scheme is "the only way" to collect a landlord's debt, but rather that the policy is *one* way to collect the debt, and a way that is an entirely rational means of avoiding financial losses to the City even though it may impose costs on innocent tenants that could be avoided under a less restrictive policy.

Respondent's answer is telling because it betrays the actual mode of review respondent urged, and the court of appeals applied below, a standard that effectively required the City to adopt the policy that would infringe upon the interests of tenants as little as possible, even at considerable sacrifice of the goal of encouraging payment for utility services. This is precisely the type of analysis courts employ under intermediate or strict scrutiny, balancing interests and requiring less restrictive alternatives if they are available. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)

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[2] Respondent also attempts to defend the decision below by pointing out that the court of appeals described its review as "rational basis review." BIO 11. But petitioner's complaint is with the Sixth Circuit's analysis, not its labels.

(intermediate scrutiny); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (strict scrutiny). But it is manifestly *not* the analysis this Court has required for review of ordinary social and economic legislation such as this. Under true rational basis review, a policy fails constitutional muster "only if [its] classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The existence *vel non* of alternative means of pursuing a governmental interest is entirely irrelevant. See, *e.g.*, *New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 592 (1979).

What this Court has repeatedly instructed, and what the court of appeals ignored, is that in the absence of a suspect classification or fundamental right, the Constitution leaves the choice among rational alternatives to elected officials whose balancing of affected interests is subject to supervision by the electorate, not the judiciary. See *Hodel* v. *Indiana*, 452 U.S. 314, 331-32 (1981). The decision of the Sixth Circuit in this case – and those of the Fifth, Seventh and Ninth Circuits which it followed – fundamentally violate that division of legislative and judicial power.

2. Respondent does not dispute that these decisions have invalidated the collection policies of large numbers of major municipal utilities throughout the country. The *amicus* brief of the Ohio Municipal League demonstrates that the City's policy is replicated in many of the largest metropolitan areas in that State, including Cincinnati, Springfield, and Akron. Joint Br. of *Amici Curiae* In Support of Petitioners 1-5.[3] Reported decisions and published ordinances further demonstrate that such policies are by no means unique to

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[3] For smaller Ohio cities, see also, *e.g.*, New Bremen Code of Ordinances 50.01, 50.06; Codified Ordinances of City of Streetsboro 925.03; Regulations and Specifications of Greene County Office of Sanitary Engineering, Part A, Sec. 307, available at http://www.co.greene.oh.us/saneng/REGS/COVERPG(Intro).pdf; Codified Ordinances of Sidney 911.13.

Ohio, but rather have been adopted by such diverse major cities as Atlanta, Memphis, Seattle, Chicago, Sacramento, St. Louis, Buffalo, and many others.[4]

Respondent attempts to belittle the importance of this wholesale invalidation of municipal collection practices, arguing that the decisions only "prohibit *one* means of enforcement of a municipality's right to collect from a landlord * * *." BIO 9 (emphasis altered). That argument overlooks the fact that termination – and, more importantly,

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[4] See, *e.g.*, *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995) (Seattle); *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976) (Memphis); *Davis* v. *Weir*, 497 F.2d 139 (CA5 1974) (Atlanta); see also Sacramento, Cal., Mun. Code 13.12.010, 13.12.110; City of St. Louis, Mo., Rev. Code 23.06.130; Scottsdale, Ariz. Rev. Code 49-22; Buffalo, N.Y., City Ordinances 3.05; Aurora, Colo., City Code 138-211, 138-225; Code of City of Pawtucket, R.I. 401-10. See also Chicago, Ill., Code 11-12-330, 11-12-480; but see Ill. Public Act 83-1098 (eff. July 1, 1984) (amending state law subsequent to *Maywood* decision). Even municipalities whose ordinances do not specify their shut-off policies in great detail often suggest that water would be cut off under the same circumstances as in Columbus. See, *e.g.*, Fort Worth, Tex., Code of Ordinances 35-10 ("If there is any change in tenant as customer on rented property and there exist, at that time, charges in arrears for past leakage, the property owner or tenant shall be held to account for payment for such leakage before service will be extended and water furnished to any new tenant."); *id.* § 7-92 (providing that landlord may not generally cause interruption of tenant's utility service and that "[t]he phrase 'cause the interruption of' includes the cutoff of a utility by a utility company due to the landlord's nonpayment of the bill"); Mun. Code of City of Rochester, N.Y. 23-17 ("All water charges * * * shall be a debt and personal obligation of the owner of the parcel of property to which the water was supplied and also of the consumer of the water."); *id.* § 23-22 ("If directed by the Commissioner of Environmental Services, water service may be shut off, as provided in this section, to any parcel for which water bills have remained delinquent and unpaid for a period of at least six months.").

the credible *threat* of termination – is the most effective and efficient method of collection available. Indeed, because the cost of a litigated collection action generally far exceeds the potential recovery, termination is often the *only* practical option for collecting a landlord's debt.

3. The question presented also implicates a substantial, longstanding, and entrenched division among the courts of appeals and between the state and federal courts in Ohio.

a. The courts of appeals have themselves repeatedly acknowledged the square circuit split. As the Sixth Circuit explained in this case, the Fifth Circuit's decision in *Davis* v. *Weir*, 497 F.2d 139 (CA5 1974), "remains intact in the Fifth Circuit, was adopted by this circuit in [*Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976)], and has been adopted by the Ninth and Seventh Circuits." Pet. App. 18a (citing *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350 (CA7 1978), cert. denied, 440 U.S. 913 (1979)). The court went on to explain, however, that "[a]t least one circuit, the Third, has rejected *Davis*." *Ibid.* (citing *Ransom* v. *Marrazzo*, 848 F.2d 398 (1988)).

The Third and Ninth Circuit have likewise acknowledged the split. See *O'Neal*, 66 F.3d at 1068 (Ninth Circuit explaining that it "reject[ed] the *Ransom* court's technical narrowing of the legislative purpose and agree[ed] with the Fifth Circuit's opinion in *Davis*"); *id.* at 1067 ("The Fifth and Third Circuits have both addressed the inquiry in similar contexts and have come to differing conclusions."); *Ransom*, 848 F.2d at 412 ("We are not persuaded by the equal protection analysis of the * * * [Fifth Circuit's] *Davis* and [Sixth Circuit's] *Craft* opinions.").

Respondent argues that all of these courts are wrong, because the division between the Third Circuit and the others "may hinge on factual distinctions" rather than differences in legal analysis. BIO 6. In particular, respondent points out that the relevant plaintiffs in *Ransom* were classified as

"occupants" rather than as "tenants" under the utility regulations at issue in that case. See *Ransom*, 848 F.2d at 401 n.1. Respondent suggests that had the plaintiffs in *Ransom* been tenants like herself, the Third Circuit would have adopted the holding of the Fifth Circuit in *Davis* just as the Sixth Circuit did in this case.

This suggestion is entirely implausible. It is true that the Third Circuit noted that the plaintiffs before it were "occupants" and not "tenants." But the court expressed substantial doubt that this distinction had any relevance, noting that an "occupant might conceivably be considered a tenant-at-will and, indeed, the regulations treat occupants and tenants similarly." 848 F.2d at 401 n.1. While the court had no occasion to decide definitively whether the occupant-tenant distinction had any relevance, its opinion makes abundantly clear that its rejection of the *Davis* line of cases had nothing to do with that distinction.

Rather than distinguish *Davis* and its progeny, the Third Circuit rejected those decisions in their entirety, concluding that they "reflect[ed] faulty reasoning and mischaracterization," 848 F.2d at 412:

> The *Davis* court unnecessarily restricts the characterization of the city's interest as not merely the collection of unpaid rents, but the collection of those rents "from the defaulting debtor." *Davis*, 497 F.2d at 145. But this is an unnecessary and misleading embellishment, which simply begs the question of the relation of means and ends. The city has a valid interest in collecting the unpaid rents from any source. Whether the means it adopts to achieve that end are legitimate is a separate question. Although there may be no logical relation between a classification scheme based on encumbrances on property that ignores personal liability and the narrow goal of collecting debts *from debtors*, *see Davis*, 497 F.2d at 145, *Craft*, 534 F.2d at 690

> (quoting *Davis*) and *Koger*, 412 F. Supp. at 1391 (same), there certainly is a logical relation between such a scheme and the more general goal of collecting debts, period. Therefore, we conclude, *contra Davis*, *Craft* and *Koger*, that the classification of service eligibility according to the presence or absence of encumbrances on the property does survive rational relationship scrutiny.

Id. at 413. Indeed, the Third Circuit held that the city's termination policy would survive even intermediate scrutiny. *Ibid.*

Respondent has provided no grounds to believe that the Third Circuit would have concluded that an identical policy would fail the much more lenient standard of rational basis scrutiny if the plaintiff were a tenant rather than an occupant. Thus the Ninth Circuit acknowledged the footnote in *Ransom* upon which respondents relies, see *O'Neal*, 66 F.3d at 1067 n.3, but nonetheless concluded that the Third Circuit's decision conflicted with *Davis*, see *id.* at 1067-68.

At the same time, there can be no doubt that the equal protection claim rejected in *Ransom* would have been accepted in the Fifth, Sixth, Seventh, or Ninth Circuits. Nothing in *Davis* or the cases that followed turned on any distinction between occupants and tenants. To the contrary, the analysis of *Davis* and its progeny has focused instead on the rationality of differences in treatment for classes of "applicants" for utility services. See, *e.g.*, *Davis*, 497 F.2d at 144 (concluding that it is irrational to draw a distinction between "*applicants* whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and *applicants* whose residence lacks the stigma of such charges") (emphasis added); Pet. App. 17a (same); see also *O'Neal*, 66. F.3d at 1068 (explaining that city cannot refuse service "to an unrelated, *unobligated third party*, whether that third party be the new tenant or any other stranger to the prior service agreement") (emphasis added).

b. The Sixth Circuit's decision also conflicts with the law applied in the state courts of Ohio. Contrary to respondent's contention (BIO 8), *Morrical* v. *Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984), decided more than simply whether a municipality may make a landlord liable for water services provided to his tenants. The case also decided whether that liability could be enforced by refusing to provide service to the landlord's new tenant. See *id.* at 439-40 (plaintiff sought injunction against denial of service to new tenant); *id.* at 442-43 (affirming denial of injunction). Although the court was not entirely clear whether it was considering a substantive due process or an equal protection claim, or whether it was considering only the rights of the landlord or also the rights of the tenant, such distinctions would not have affected the analysis. The constitutional question in each instance would be whether the policy was rationally related to a legitimate government interest, a test that does not vary depending on the identity of the plaintiff.[5] In *Morrical*, the court concluded that the city's termination policy was not "arbitrary or unreasonable" and therefore violated neither the Equal Protection Clause nor the Due Process Clause. *Id.* at 442. That holding would be dispositive of respondent's equal protection claim in this case and is irreconcilable with the Sixth Circuit's contrary decision. Certiorari is warranted to resolve this untenable conflict between the state and federal courts in Ohio.

c. Respondent's citation to *Midkiff* v. *Adams County Regional Water District*, 409 F.3d 758 (CA6 2005), is also unavailing. In *Midkiff*, the court upheld a city's policy of refusing to contract for water services directly with tenants, finding a rational basis for treating landlords and tenants

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[5] See *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-32 (1963) (rational basis scrutiny for substantive due process claims not implicating fundamental rights); *Pennell* v. *City of San Jose*, 485 U.S. 1, 14 (1988) (same for equal protection claim by landlord); Pet. App. 16a (same for equal protection claim by tenant).

differently. The court of appeals acknowledged the decision in this case, but concluded that it was distinguishable because this case involved termination of services to different classes of tenants, while *Midkiff* involved distinctions between tenants and landlords in opening water accounts. *Id.* at 770-71. To the extent respondent suggests, BIO 7-8, that the Third Circuit might some day rely on a similar difference in "factual circumstances" as grounds for adopting the *Davis* line of precedent, that suggestion is implausible. As described above, the Third Circuit rejected *Davis* because of a fundamental disagreement with the foundations of the Fifth Circuit's analysis, not because it concluded that the case before it was factually distinguishable from *Davis*.

If anything, *Midkiff* enhanced the need for review of the question presented. As the law of the Sixth Circuit now stands, a city may insist on contracting only with landlords, see *Midkiff*, 409 F.3d at 760, 770, but is unable to terminate service to the landlord when he fails to pay the water bill if the current tenant was not responsible for the arrearage, see Pet. App. 19a-21a. Moreover, while the city may terminate service to an innocent tenant at a landlord's request, see *Midkiff*, 409 F.3d at 760, a city is prohibited from terminating service to a property in order to enforce the landlord's payment obligations, see Pet. App. 19a.

The decision in *Midkiff* thus provides no remedy for the injury to municipal interests inflicted by the decision below. Moreover, there is no reason to believe that the Sixth Circuit will itself resolve this problem – the plaintiff in *Midkiff*, represented by respondent's lawyer in this case, petitioned for rehearing en banc, asserting an intra-circuit conflict with this case, but that petition was denied without dissent. *Midkiff* v. *Adams County Reg'l Water Dist.*, No. 04-3508, 2005 U.S. App. LEXIS 19,254 (CA6 Aug. 30, 2005). In any case, even if the Sixth Circuit reversed course, that would only convert the circuit split from a four-one to a three-two split that would still require resolution by this Court, and this case is an ideal vehicle in which to resolve the conflict.

5. Respondent's failure to preserve her procedural due process claim is also no reason to deny certiorari. Contra BIO 11-13. The two claims are analytically distinct, the first asking *whether* the Constitution permitted the City to terminate respondent's service and the second asking *how* such termination should be effected if it is permitted at all. Respondent suggests no reason, other than her own desire to have both issues addressed by this Court, why the constitutional questions cannot be addressed separately.

Moreover, respondent's due process challenge does not merit review by this Court. Contrary to respondents' suggestion, BIO 12-13, there is no circuit conflict on whether a tenant has a property interest in water service protected by the Due Process Clause. That question depends on whether state law creates a "legitimate claim of entitlement" to continued service. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The difference in outcomes among the cases respondent cites turns entirely on differences in state law. See, *e.g.*, Pet. App. 9a; *Midkiff*, 409 F.3d at 764-65; *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536, 1539-40 (CA11 1986). As a result, respondent's due process claim is wholly fact-bound and presents no question of general import.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan E. Ashbrook
COLUMBUS CITY ATTORNEY'S
OFFICE
90 W. Broad Street
Suite 200 City Hall
Columbus, OH 43215

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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